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APPENDIX

JUN 12 1971

E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

[redacted]

PAUL M. BRANZBURG - - - - *Petitioner,*

versus

JOHN P. HAYES, Judge, Etc., Et Al.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Petition for a Writ of Certiorari Filed February 23, 1971
Certiorari Granted May 3, 1971

WESTERFIELD-BONTE CO., INC., 819 W. KENTUCKY, LOUISVILLE, KY.

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Erratum

Page ii, line 10 and 11, should be corrected to re

Statutes:

Kentucky Revised Statutes, §421.100 14,

CHRONOLOGICAL LIST OF PLEADINGS, HEARINGS AND ORDERS IN RE RESPONDENT HAYES

November 25, 1969	Respondent ordered by the Judge of the Criminal Branch, Second Division, Jefferson Circuit Court, to answer questions posed by grand jury.
November 25, 1969	Petition for Temporary and Permanent Relief filed with Kentucky Court of Appeals.
November 25, 1969	Kentucky Court of Appeals Order of Temporary Prohibition.
November 27, 1970	Opinion of the Kentucky Court of Appeals denying permanent relief and dissenting opinion of Chief Justice Hill.
December 7, 1970	Motion to Reconsider filed with the Kentucky Court of Appeals.
January 22, 1971	Modified opinion and mandate from the Kentucky Court of Appeals denying permanent relief and dismissing petition.
January 22, 1971	Motion to Kentucky Court of Appeals for a stay of 90 days.
January 25, 1971	Order of Kentucky Court of Appeals denying Stay.

CHRONOLOGICAL LIST OF PLEADINGS, HEARINGS AND ORDERS IN RE RESPONDENT MEIGS

January 14, 1971	Subpoena issued for Petitioner to appear before the Franklin County, Kentucky, Grand Jury.
January 18, 1971	Motion by Petitioner to quash grand jury subpoena.
January 18, 1971	Motion to quash subpoena denied by Respondent Meigs.
January 18, 1971	Petition for Temporary and Permanent Relief filed with the Kentucky Court of Appeals.
January 22, 1971	Protective Order issued by Respondent Meigs.
January 22, 1971	Order and Opinion of Kentucky Court of Appeals denying prohibition and Mandatory Relief.
January 22, 1971	Motion to Kentucky Court of Appeals for a stay of 90 days and motion for temporary writ of prohibition.
January 25, 1971	Order of Kentucky Court of Appeals denying stay.

The Courier-Journal, Louisville, Ky.—Saturday Morning, November 15, 1969

Could Be a Pot of Gold

THE HASH THEY MAKE ISN'T TO EAT

By Paul M. Branzburg
Courier-Journal Staff Writer

Larry, a young Louisville hippie, wiped the sweat off his brow, looked about the stuffy little room and put another pot on a stove over which he had been laboring for hours.

For over a week, he has been proudly tending his pots and pans. But he also has paused frequently to peek out the door in search of "The Man" (police).

Larry and his partner, Jack, are engaged in a weird business that is a combination of capitalism, chemistry and criminality.

They are operating a makeshift laboratory in south-

Pictures on Page B 1.

central Louisville that may produce them enough hashish, or "hash", a concentrate of marijuana, to net them up to $5,000 for three weeks of work.

Larry and Jack were once run-of-the-mill dope dealers, but in the past few months they have expanded operations and become dope manufacturers.

On a sunny afternoon last week, Larry entered his "lab" and began another day of cooking hash. With long-handled pruning shears, he began chopping marijuana stems into a large tub.

"I don't know why I'm letting you do this story," he said quietly. "To make the narcs (narcotics detectives) mad, I guess. That's the main reason." However, Larry and his

partner asked for and received a promise that their names would be changed.

The room had once been a kitchen, but it now smelled like a stable. A bare lightbulb on the ceiling cast a pallid glow over the cracked pink walls, an old-fashioned gas stove, a green mattress on the floor and a pile of cheap broken furniture in the corner. A filthy sink was stacked with dirty dishes. The floor was covered with discarded marijuana that had already been processed.

'Partly an Ego Trip'

"The trouble we're having is finding the right base," Larry said, as he continued to chop stems. "The hash we've produced gets you stoned, but it doesn't smoke the same way as foreign hash. I tried to use incense as a base, but it gives too much of a sweet taste. In the Middle East they use camel manure, so I'm thinking of going out to the zoo and copping some camel manure."

"For me, making hash is partly an ego trip," he said. "To see how good I can make it. To see how close I can get it to foreign hash. We've gotten it to the right consistency, but not the right taste."

Larry is a tall, slender 21-year-old who has traveled over much of the world and whose parents live in a very comfortable home in the East End. He has been on Louisville's hip scene for about a year.

Jack is a long-haired 20-year-old who has been in Louisville two years. "I came down here when I was 18," he says, "and my sister was turning on, and so I slowly met the hip people."

Have 30 Pounds

Both deny they are manufacturing hash for the money, although they admit that it can be fantastically profitable.

Hashish is most commonly sold at about $7 to $10 per gram, and there are about 29 grams per ounce. Larry and Jack have about 30 pounds of marijuana—originally picked

in Kentland, Ind.—and that is enough to yield about five pounds of hashish.

When sold in bulk, hashish brings $800 to $1,000 per pound. Larry and Jack already have five buyers who want a pound apiece. So they should make $4,000 to $5,000 for three weeks of work.

At first glance, it appears that Larry and Jack make a great deal of money. Actually, if they are successful in manufacturing and selling five pounds of hashish, they will probably go out of business for a few months. They have only bothered to make hashish three times this year.

"If you have no status to live up to, you don't worry when you run out of bread (money)," says Jack. "It's nice to work and have nice things, but its too much of a hassle."

Larry poured rubbing alcohol into the tub of marijuana stems and put it on the stove to cook. Soon the room was full of the sick smell of gaseous alcohol. Larry opened the window and sat down on the mattress to avoid the fumes.

"Actually, this is a service to keep people away from heroin," he said, seriously. "Junk is like being dead. You can't eat, sleep or have sex. But hash is enlightening."

The dope duo have divided up business responsibilities. Larry manufactures. Jack is "vice president in charge of sales—or something like that."

JEFFERSON CIRCUIT COURT

CRIMINAL BRANCH, SECOND DIVISION
COMMONWEALTH OF KENTUCKY, COUNTY OF JEFFERSON

In Re: No. 141087

ORDER

AT A COURT HELD NOVEMBER 25, 1969.

This case being before the November Term of the Grand Jury, comes Edwin A. Schroering, Jr., Commonwealth's Attorney, and requests the Court to rule whether the witness, PAUL BRANZBURG, should be held in contempt of Court, under Rule 5.12, for failing to answer two questions propounded to him by the Grand Jury. Comes the Foreman of the Grand Jury, Mr. E. H. Speckman, Jr., and reads the questions, to-wit:

#1. On November 12, or 13, 1969, who was the person or persons you observed in possession of Marijuana, about which you wrote an article in the Courier-Journal on November 15, 1969?

#2. On November 12, or 13, 1969, who was the person or persons you observed compounding Marijuana, producing same to a compound known as Hashish?

Argument of the Commonwealth and the witness, Paul Branzburg by counsel, Mr. Edgar A. Zingman heard. Mr. Zingman argued that Rule 421.100 applies in this case and that the witness, Paul Branzburg, should not be required to answer the questions. The Commonwealth's argument that Rule 421.100 does not apply in this case heard. The Commonwealth requests that the Court direct the witness, Paul Branzburg, to answer the questions propounded to him by the Grand Jury. The Court being sufficiently advised, holds

that the witness shall answer. Ordered that this case be and is assigned to 9:30 A.M. Wednesday, November 26, 1969. Counsel, Mr. Zingman, enters his objection on the grounds pursuant to Rule 421.100 and the freedom of the Press under the First Amendment to the Constitution of the United States of America.

/s/ J. MILES POUND, JUDGE

IN THE

COURT OF APPEALS OF KENTUCKY

ORIGINAL NO. F-213-69

PAUL BRANZBURG - - - - PETITIONER

vs.

J. MILES POUND, Judge, Jefferson Circuit Court, Criminal Branch, Second Division, Jefferson County Courthouse, Louisville, Kentucky - - - - - - RESPONDENT

PETITION FOR TEMPORARY AND PERMANENT RESTRAINING ORDER AND WRIT OF MANDAMUS

Comes now Paul Branzburg, by counsel, pursuant to R.C.A. 1.420 and C.R. 81, and for his petition states as follows:

(1) The Respondent against whom relief is sought is the Honorable J. Miles Pound, Judge, Jefferson Circuit Court, Criminal Division, Jefferson County Courthouse, Louisville, Kentucky.

(2) The facts entitling Petitioner to relief are:

(a) Petitioner is an individual employed by the Courier-Journal & Louisville Times Company, a Kentucky corporation.

(b) Petitioner's duties as a reporter require Petitioner to seek out and contact sources of news information, to then write stories based upon the facts he has observed and to have such stories published in the newspapers published by his employer in Jefferson County, Kentucky for distribution and sale in Jefferson County, Kentucky, throughout

the Commonwealth of Kentucky and in various places in the United States.

(c) In the November 15, 1969 issue of the Courier-Journal, there appeared a story written by Petitioner based upon information which he had acquired on or about November 12 or 13, 1969. A copy of the story is attached hereto and made a part of this petition.

(d) On November 25, 1969, the Petitioner was called before a grand jury sitting in Jefferson County, Kentucky and was examined concerning the events and matters set forth in the story attached hereto. During the course of that examination Petitioner was asked the following questions:

1. On November 12 and 13, 1969, who was the person or persons you observed in possession of marijuana of which you wrote an article in the Courier-Journal of November 15, 1969?
2. On November 12 and 13, 1969, who was the person or persons you observed in compounding and mixing marijuana reducing same to a compound known as hashish of which you wrote an article in the Courier-Journal of November 15, 1969?

(e) The Petitioner refused to answer each of said questions on the grounds of the privilege not to answer afforded to him by KRS 421.100 which provides as follows:

> 421.100 (1649d-1) Newspaper, radio or television broadcasting station personnel need not disclose source of information.
>
> No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly; or any committee thereof, or before

any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.

(f) Following upon this claim of privilege the Petitioner, the foreman of the grand jury and the Commonwealth's attorney appeared before the Respondent. The matter was presented to the Respondent. The undersigned counsel for the Petitioner advised the Respondent that the Petitioner was entitled not to answer the questions under the provisions of KRS 421.100 and under the provisions of the First and Fourteenth Amendments to the Constitution of the United States and Sections 1, 2 and 8 of the Constitution of the Commonwealth of Kentucky.

(g) After hearing counsel, the Respondent directed that the Petitioner should appear again before the grand jury and that the question should again be put to the Petitioner. He further announced that in the event that the grand jury shall report back to Respondent that the Petitioner had again refused to answer the questions, that Respondent would then pursue the provisions provided for dealing with contempts of court.

(h) The Respondent set 9:30 A.M., Wednesday, November 26, 1969, as the time for further proceedings in this matter.

(i) Following upon the announcement of the ruling of the Court the Petitioner again appeared before the grand jury and upon being posed the same questions again asserted his privilege against answering said questions and refused to answer said questions.

(3) The contempt action which will be against the Petitioner on November 26, 1969, is clearly violative of his rights and privileges as provided under KRS 421.100 and

under Sections 1, 2 and 8 of the Constitution of the Commonwealth of Kentucky and the First and Fourteenth Amendments of the Constitution of the United States of America. It is an interference with the exercise of freedom of the press and would permit courts to destroy that confidential relationship which is essential to a free press and which has been provided for by the Legislature of the Commonwealth of Kentucky.

(4) The nature of the relief sought:

(The Petitioner, by counsel, respectfully prays that a writ issue from this Court requiring that:

(a) The Respondent, the Honorable J. Miles Pound, Judge, Jefferson Circuit Court, Criminal Division, Jefferson County Courthouse, Louisville, Kentucky, be restrained from proceeding against the Petitioner on November 26, 1969 or thereafter in the matter of contempt proceedings growing out of the exercise by the Petitioner under his privilege under KRS 421.100 and the Constitutions of the Commonwealth of Kentucky and of the United States of America.

(b) That the entire matter be set down for hearing at a time to be set by this Court for determination upon a permanent writ against the Respondent.

(c) All other necessary and proper relief to which the Petitioner shall appear entitled.

Respectfully submitted,

WYATT, GRAFTON & SLOSS
300 Marion E. Taylor Building
Louisville, Kentucky 40202
/s/ Edgar A. Zingman
/s/ Robert C. Ewald
Counsel for Petitioner

The affiant, Paul Branzburg, states that he has read the foregoing petition, and that the statements contained therein are true as he verily believes.

/s/ Paul Branzburg

(Jurat and Certificate of Service omitted in printing)

IN THE

COURT OF APPEALS OF KENTUCKY

F-213-69

PAUL BRANZBURG - - - - PETITIONER

VS.

J. MILES POUND, Judge, Jefferson Circuit Court, Criminal Branch, Second Division, Jefferson County Courthouse, Louisville, Kentucky - - - - - RESPONDENT

To: J. Miles Pound, Judge
Jefferson Circuit Court,
Criminal Branch, Second
Division, Jefferson County
Courthouse, Louisville, Kentucky

ORDER

This cause coming on to be heard on the petition of Paul Branzburg for an order prohibiting further proceedings by the respondent in the matter of the contempt of the aforesaid Paul Branzburg for refusing to answer questions posed to him by a grand jury sitting this date in Jefferson County, Kentucky, concerning a certain news story written

by the aforesaid Paul Branzburg and published in the Courier-Journal in Louisville, Kentucky, on November 15, 1969, and the court being sufficiently advised, it is ordered,

That you be temporarily prohibited from further action in the above-entitled matter until your response has been made and this court has had an opportunity to consider the question presented on its merits.

Heard before Judges Reed, Osborne and Milliken.

ENTERED this November 25, 1969.

/s/ James B. Milliken,
Acting Chief Justice,
Court of Appeals

RENDERED: NOVEMBER 27, 1970

COURT OF APPEALS OF KENTUCKY

PAUL BRANZBURG, - - - PETITIONER,

V. IN COURT OF APPEALS

J. MILES POUND, JUDGE, JEFFERSON CIRCUIT COURT, CRIMINAL BRANCH, SECOND DIVISION, - - RESPONDENT.

OPINION OF THE COURT BY COMMISSIONER VANCE DISMISSING PETITION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS

The petitioner, Paul Branzburg, a staff writer for the Louisville Courier Journal, produced an illustrated story entitled "The Hash They Make Isn't to Eat" which was published in the Courier Journal on November 15, 1969 and revealed how a copious quantity of marijuana was converted into the more potent drug *hashish* for which a locally profitable and ready market impliedly existed. The story

was based upon information acquired by the writer's observation during an interview granted to him upon a pledge that the identity of the two producers of *hashish* would not be revealed.

When summoned to appear before the Jefferson County Grand Jury ten days later, Branzburg refused to disclose the identity of the men, was held in contempt for his refusal, and we stayed enforcement of the contempt order until the intrinsically important legal issues presented could be given more consideration.

Marijuana (cannabis) is defined as a narcotic drug by statute, KRS 218.010(14), and unlicensed possession or compounding of such drugs is a felony punishable by both fine and imprisonment. KRS 218.210. Therefore Branzburg saw the commission of the statutory felonies of unlawful possession of marijuana and the unlawful conversion of it into hashish.

KRS 421.100 provides:

> "No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected."

The petitioner concedes in his argument before this court that the general weight of authority is that there is no constitutional guarantee of the privilege he seeks (see Judy Garland v. Marie Torre, 259 F. 2d 545, Second Circuit, Certiorari Denied, 79 S. Ct. 237 (1958)), and petitioner

submits that the only question before this court is the meaning of the words *source of any information* as used in KRS 421.100.

On behalf of the respondent, it is urged that *source of information* refers to an informant and that the statute was enacted to allow and to encourage a person having knowledge of matters which should be called to public attention to make those matters known without revealing his identity and without subjecting himself to the possibility of vengeance, retribution or public embarrassment which might be brought upon him by a revelation of his identity.

The petitioner, on the other hand, contends that *source of information* should be construed to mean all knowledge received by a newsman no matter what the source. He argues, in effect, that when a newsman observes something, the thing observed is itself the source of the information.

At the outset we observe that at common law no privilege existed in favor of communications made to newsmen. In re Goodfader, Hawaii, 367 P. 2d 472 (1961); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (1957); 58 Am. Jur., Witnesses, Section 546; 97 C.J.S., Witnesses, Section 259, See Annotation 7, ALR 3rd 591.

KRS 421.100 which grants a newsman the privilege against disclosing his *source of information* is therefore a statute in derogation of the common law. The rule that statutes in derogation of the common law should be strictly construed does not apply in Kentucky. KRS 446.080. Nevertheless some limitations by way of statutory construction have been placed upon statutes relating to privileged communications and it is elementary that a privilege which did not exist at common law cannot be asserted under a statute unless it is clear that the statute was intended to grant the privilege.

In construing KRS 421.210(4) relating to privileged communications to attorneys, the identity of one employ-

ing an attorney to return stolen merchandise was held not privileged because such employment of an attorney was not in his professional capacity. Hughes v. Meade, Ky., 453 S. W. 2d 538 (1970). Communication made to an attorney in his professional capacity was nevertheless denied privilege when the person making the communication subsequently employed another attorney and sought to maintain a fraudulent action which would have been defeated by the disclosure of the alleged privileged communication. Fidelity-Phenix Fire Ins. Co. of New York v. Hamilton, Ky., 340 S. W. 2d 218 (1960). Communications to an attorney of an intention to commit future crimes or frauds are not entitled to privilege under the statute. Cummings v. Commonwealth, 221 Ky. 301, 298 S. W. 943 (1927) and Standard Fire Ins. Co. v. Smithhart, 183 Ky. 679, 211 S. W. 441 (1919), 5 ALR 972.

It is the opinion of this court that the language of KRS 421.100 granting immunity to a newsman from disclosing the *source of any information* procured or obtained by him, grants a privilege from disclosing the source of the information but does not grant a privilege against disclosing the information itself.

Information as used in the statute refers to the things or the matters which a reporter learns and *source* refers to the method by which or to the person from whom he learns them.

In this case the reporter learned that two men were engaged in the process of making hashish. Their identity, as well as the activity in which they were engaged, was a part of the *information* obtained by him, but their identity was not the *source* of the information.

The actual *source* of the information in this case was the reporter's personal observation. In addition some informant may have provided him with information that at a certain time and place he could observe the process of conversion of marijuana into hashish. If such was the case

we have no doubt that the identity of the informant was protected by the statute.

The reporter, however, was not asked to reveal the identity of any such informant and his privilege from making that disclosure is not in question. He was asked to disclose the identity of persons seen by him in the perpetration of a crime and he refused, urging as a justification for such refusal, that the statute should be given a broad construction extending his privilege against disclosure to all his knowledge of this incident rather than just the source of the knowledge.

The harm which ultimately might result to society from letting the reporter maintain his silence as to the identity of those seen by him in the commission of the crime in the instant case might not be earthshaking but we must consider where such a course could lead us.

Suppose a newsman or reporter should see the President of the United States or the Governor of the Commonwealth assassinated upon the street; or see a bank robbery in progress; or see a forcible rape committed. Under the construction of the statute sought by the petitioner, such a reporter could not be compelled to identify the perpetrator of the crime. We do not think the legislature ever intended such a result.

Support for the proposition that no such carte blanche privilege was intended is found in the limiting language of the statute requiring a publication of the information before any privilege attaches against disclosure of the source thereof.

In all likelihood the present case is complicated by the fact that the persons who committed the crime were probably the same persons who informed Branzburg that the crime would be, or was being, committed. If so, this is a rare case where informants actually informed against themselves. But in that event the privilege which would have protected disclosure of their identity as *informants* cannot

be extended beyond their role as informants to protect their identity in the entirely different role as perpetrators of a crime.

For the reasons herein given we feel that KRS 421.100 does not extend to the petitioner a privilege to refuse to answer the specific questions asked of him by the Jefferson County Grand Jury. The petition for writ of prohibition and writ of mandamus is hereby dismissed.

Milliken, Palmore, Osborne, Steinfeld and Reed concur.

Neikirk, J., not sitting.

Dissenting opinion by Hill, C.J.

ATTORNEYS FOR PETITIONER:

Edgar A. Zingman & Robert C. Ewald
Wyatt, Grafton & Sloss
300 Marion E. Taylor Building
Louisville, Kentucky 40202

ATTORNEYS FOR RESPONDENT:

Edwin A. Schroering
Commonwealth's Attorney
Courthouse
Louisville, Kentucky 40202

Carl C. Ousley, Jr.
First Assistant Commonwealth's Attorney
Courthouse
Louisville, Kentucky 40202

DISSENTING OPINION BY CHIEF JUSTICE EDWARD P. HILL, JR.

I respectfully dissent from the majority's opinion interpreting an act of the Legislature (KRS 421.100) that has been the law of our Commonwealth for more than thirty-four years without being heretofore questioned in the courts.

I shall not attempt to reiterate in this dissent the facts of the case but shall go right to the heart of the question. The majority opinion to my mind has adopted a strained

and unnecessarily narrow construction of the term "source of any information procured or obtained" used in KRS 421.100. I believe that the phrase "source of any information" is a broad, comprehensive one, certainly not a technical phrase.

The majority opinion stands for the proposition that the statute in question does not apply in instances in which a newspaper reporter witnesses the commission of a crime. But the statute does not place any such limitation on the privilege. It certainly would have been no trouble for the Legislature to have provided for an exception to the privilege had it thought one advisable. The statute in question is the expression of public policy by the proper branch of government, the Legislature, after nearly 150 years' experience, and this court has no business interfering with great and fundamental policy questions of our system of government.

It must be remembered that the present case does not involve injury to life, limb, or property. But even if it did, we have a situation requiring the balance of values, and I believe, as apparently did the Legislature, that the benefits to society from thoroughly and correctly reporting current events greater outweighs the probable and highly imaginary possibility of their abuse under the statute. Who ever heard of a man about to commit a crime against life, limb, or property either calling in a newspaper reporter or soliciting a newspaper reporter to witness the crime upon being assured that the reporter would not disclose what he was about to observe? Actually, the privilege provided in the statute is one which the newspaper people may weigh, and I have greater confidence in the newspaper world than to think it would participate in such an imaginary scheme or refuse to divulge important information obtained under such circumstances.

I recognize that the authorities in this country are not uniform with respect to whether newspapers have the privilege safeguarded by our statute and guaranteed by the First Amendment to the Constitution of the United States. See 47 Oregon L. Rev. 243 (1968), and 82 Harv. L. Rev. 1384 (1969). However, I am unable to find any authority from any state refusing to give such privilege a broad interpretation when a statute has been enacted by the legislature of such state safeguarding that privilege.

For an excellent summary of various newspapermen immunity statutes see D'Alemberte, "Journalists Under the Ax: Protection of Confidential Sources of Information," 6 Harv. J. Legis 307 (1969).

I conclude this dissent by quoting Re Robert L. Taylor, 412 Pa. 32, 193 A2d 181, 185, 7 ALR 3d 580, 587 (1963):

> "It is a matter of widespread common and therefore of Judicial knowledge that newspapers and news media are the principal source of news concerning daily local, State, National and international events. We would be unrealistic if we did not take judicial notice of another matter of wide public knowledge and great importance, namely, that important information, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public duty, bribery, corruption, conspiracy and other crimes committed or possibly committed by public officials or by powerful individuals or organizations, unless newsmen are able to *fully and completely* protect the sources of their information. It is vitally important that this public shield against governmental inefficiency, corruption and crime be preserved against piercing and erosion.
>
> * * * * * * *
>
> "The Act of 1937 is a wise and salutary declaration of public policy whose spiritual father is the revered

Constitutionally ordained freedom of the press. The Act must therefore, we repeat, be liberally and broadly construed in order to carry out the clear objective and intent of the Legislature *which has placed the gathering and the protection of the source of news as of greater importance to the public interest and of more value to the public welfare* than the disclosure of the alleged crime or the alleged criminal."

I would issue the writ of prohibition sought herein.

ATTORNEYS FOR PETITIONER:

Edgar A. Zingman
Robert C. Ewald
Wyatt, Grafton & Sloss
300 Marion E. Taylor Building
Louisville, Kentucky 40202

ATTORNEYS FOR RESPONDENT:

Edwin A. Schroering
Commonwealth's Attorney
Courthouse
Louisville, Kentucky 40202

Carl C. Ousley, Jr.
First Assistant Commonwealth's Attorney
Courthouse
Louisville, Kentucky 40202

(Title omitted in printing)

MOTION TO RECONSIDER

The petitioner, Paul Branzburg, by counsel, moves the Court to reconsider its decision and order rendered November 27, 1970, based on the Memorandum attached hereto and the decision of the United States Court of Appeals for the Ninth Circuit in *Caldwell* v. *United States,* No. 26,025,

(November 16, 1970) a copy of which is filed with this motion.

WYATT, GRAFTON & SLOSS
300 Marion E. Taylor Building
Louisville, Kentucky 40202
582-1881

Counsel for Petitioner

(s) Edgar A. Zingman
(s) Robert C. Ewald

(Certificate of Service omitted in printing)

RENDERED: November 27, 1970

COURT OF APPEALS OF KENTUCKY

PAUL BRANZBURG - - - - PETITIONER

V. IN COURT OF APPEALS

J. MILES POUND, JUDGE, JEFFERSON CIRCUIT COURT, CRIMINAL BRANCH, SECOND DIVISION, - - RESPONDENT

OPINION OF THE COURT BY COMMISSIONER VANCE DISMISSING PETITION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS

The petitioner, Paul Branzburg, a staff writer for the Louisville Courier-Journal, produced an illustrated story entitled "The Hash They Make Isn't to Eat" which was published in the Courier-Journal on November 15, 1969, and revealed how a copious quantity of marijuana was converted into the more potent drug *hashish* for which a locally profitable and ready market impliedly existed. The story

was based upon information acquired by the writer's observation during an interview granted to him upon a pledge that the identity of the two producers of *hashish* would not be revealed.

When summoned to appear before the Jefferson County Grand Jury ten days later, Branzburg refused to disclose the identity of the men. He was ordered to reappear before the grand jury and threatened with contempt penalties if he persisted in his refusal to answer the questions propounded. We stayed further proceedings until the intrinsically important legal issues presented could be given more consideration.

Marijuana (cannabis) is defined as a narcotic drug by statute, KRS 218.010(14), and unlicensed possession or compounding of such drugs is a felony punishable by both fine and imprisonment. KRS 218.210. Therefore Branzburg saw the commission of the statutory felonies of unlawful possession of marijuana and the unlawful conversion of it into hashish.

KRS 421.100 provides:

> "No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected."

The petitioner concedes in his argument before this court that the general weight of authority is that there is no constitutional guarantee of the privilege he seeks (see

Judy Garland v. Marie Torre, 259 F. 2d 545, Second Circuit, Certiorari Denied, 79 S. Ct. 237 (1958)), and petitioner submits that the only question before this court is the meaning of the words *source of any information* as used in KRS 421.100.[1]

On behalf of the respondent, it is urged that *source of information* refers to an informant and that the statute was enacted to allow and to encourage a person having knowledge of matters which should be called to public attention to make those matters known without revealing his identity and without subjecting himself to the possibility of vengeance, retribution or public embarrassment which might be brought upon him by a revelation of his identity.

The petitioner, on the other hand, contends that *source of information* should be construed to mean all knowledge received by a newsman no matter what the source. He argues, in effect, that when a newsman observes something, the thing observed is itself the source of the information.

At the outset we observe that at common law no privilege existed in favor of communications made to newsmen. In re Goodfader, Hawaii, 367 P. 2d 472 (1961); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (1957); 58 Am. Jur., Witnesses, Section 546; 97 C.J.S., Witnesses, Section 259, See Annotation 7, ALR 3rd 591.

KRS 421.100 which grants a newsman the privilege against disclosing his *source of information* is therefore a

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[1]Petitioner raised the question of constitutional privilege and conceded that the weight of authority was that no such constitutional privilege existed in the following language:

"Although the general weight of authority seems to hold that there is no constitutional guarantee to such a privilege, there does seem to be a minority viewpoint that there is such a privilege existing under the first amendment." (Petitioner's supplemental memorandum—page 2.)

Petitioner then abandoned the claim of first amendment privilege, as follows:

"Thus, the controversy continues as to whether a newsman's source of information should be privileged. However, that ques-

(Footnote continued on following page.)

statute in derogation of the common law. The rule that statutes in derogation of the common law should be strictly construed does not apply in Kentucky. KRS 446.080. Nevertheless some limitations by way of statutory construction have been placed upon statutes relating to privileged communications and it is elementary that a privilege which did not exist at common law cannot be asserted under a statute unless it is clear that the statute was intended to grant the privilege.

In construing KRS 421.210(4) relating to privileged communications to attorneys, the identity of one employing an attorney to return stolen merchandise was held not privileged because such employment of an attorney was not in his professional capacity. Hughes v. Meade, Ky., 453 S. W. 2d 538 (1970). Communication made to an attorney in his professional capacity was nevertheless denied privilege when the person making the communication subsequently employed another attorney and sought to maintain a fraudulent action which would have been defeated by the disclosure of the alleged privileged communication. Fidelity-Phenix Fire Ins. Co. of New York v. Hamilton, Ky., 340 S. W. 2d 218 (1960). Communications to an attorney of an intention to commit future crimes or frauds are not entitled to privilege under the statute. Cummings v. Commonwealth, 221 Ky. 301, 298 S. W. 943 (1927) and Standard Fire Ins. Co. v. Smithhart, 183 Ky. 679, 211 S. W. 441 (1919), 5 ALR 972.

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tion is not before the Court in this case. The Legislature of Kentucky has settled the issue, having decided that a newsman's source of information is to be privileged. Because of this there is no point in citing Professor Wigmore and other authorities who speak against the grant of such a privilege. The question has been many times debated, and the Legislature has spoken. The only question before the Court is the construction of the term 'source of information' as it was intended by the Legislature.'" (Petitioner's supplemental memorandum—page 4.)

Accordingly, this opinion limits itself to the construction of the statute.

It is the opinion of this court that the language of KRS 421.100 granting immunity to a newsman from disclosing the *source of any information* procured or obtained by him, grants a privilege from disclosing the source of the information but does not grant a privilege against disclosing the information itself.

Information as used in the statute refers to the things or the matters which a reporter learns and *source* refers to the method by which or to the person from whom he learns them.

In this case the reporter learned that two men were engaged in the process of making hashish. Their identity, as well as the activity in which they were engaged, was a part of the *information* obtained by him, but their identity was not the *source* of the information.

The actual *source* of the information in this case was the reporter's personal observation. In addition some informant may have provided him with information that at a certain time and place he could observe the process of conversion of marijuana into hashish. If such was the case we have no doubt that the identity of the informant was protected by the statute.

The reporter, however, was not asked to reveal the identity of any such informant and his privilege from making that disclosure is not in question. He was asked to disclose the identity of persons seen by him in the perpetration of a crime and he refused, urging as a justification for such refusal, that the statute should be given a broad construction extending his privilege against disclosure to all his knowledge of this incident rather than just the source of the knowledge.

The harm which ultimately might result to society from letting the reporter maintain his silence as to the identity of those seen by him in the commission of the crime in the instant case might not be earthshaking but we must consider where such a course could lead us.

Suppose a newsman or reporter should see the President of the United States or the Governor of the Commonwealth assassinated upon the street; or see a bank robbery in progress; or see a forcible rape committed. Under the construction of the statute sought by the petitioner, such a reporter could not be compelled to identify the perpetrator of the crime. We do not think the legislature ever intended such a result.

Support for the proposition that no such carte blanche privilege was intended is found in the limiting language of the statute requiring a publication of the information before any privilege attaches against disclosure of the source thereof.

In all likelihood the present case is complicated by the fact that the persons who committed the crime were probably the same persons who informed Branzburg that the crime would be, or was being, committed. If so, this is a rare case where informants actually informed against themselves. But in that event the privilege which would have protected disclosure of their identity as *informants* cannot be extended beyond their role as informants to protect their identity in the entirely different role as perpetrators of a crime.

For the reasons herein given we feel that KRS 421.100 does not extend to the petitioner a privilege to refuse to answer the specific questions asked of him by the Jefferson County Grand Jury. The petition for writ of prohibition and writ of mandamus is hereby dismissed.

Milliken, Palmore, Osborne, Steinfeld and Reed concur.

Neikirk, J., not sitting.

Dissenting opinion by Hill, C.J.

ATTORNEYS FOR PETITIONER:

Edgar A. Zingman & Robert C. Ewald
Wyatt, Grafton & Sloss
300 Marion E. Taylor Building
Louisville, Kentucky 40202

ATTORNEYS FOR RESPONDENT:

Edwin A. Schroering
Commonwealth's Attorney
Courthouse
Louisville, Kentucky 40202

Carl C. Ousley, Jr.
First Assistant Commonwealth's Attorney
Courthouse
Louisville, Kentucky 40202

MANDATE

THE COMMONWEALTH OF KENTUCKY
The Court of Appeals
Fall Term—November 27, 1970

Paul Branzburg

vs.

J. Miles Pound, Judge, Jefferson Circuit Court, Criminal Branch—2nd Div., Louisville, Kentucky

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Appeal from a judgment of the
In Court of Appeals Circuit Court

The Court being sufficiently advised, delivered an opinion dismissing petition for writ of prohibition and writ of mandamus.

It is therefore considered that said petition be dismissed; which is ordered to be certified.

It is further considered that the appellee recover of the appellant his cost herein expended.

A copy—Attest:

DICK VERMILLION, C.C.A.
By (s) John C. Scott, D. C.

Issued January 22, 1971

(Title omitted in printing)

MOTION FOR AN ORDER STAYING THE EFFECTIVE DATE OF THE COURT'S ORDER

Pursuant to Rule 1.345 R.C.A., Petitioner Paul Branzburg, by counsel, for the reasons set forth in his Affidavit and the Memorandum filed herewith, respectfully moves the Court to stay the effective date and enforcement of its Order in the above styled actions for 90 days, to allow the Petitioner time to obtain a writ of certiorari from the Supreme Court of the United States.

WYATT, GRAFTON & SLOSS
Third Floor
Marion E. Taylor Building
Louisville, Kentucky 40202
582-1881
Counsel for Petitioner
/s/ Edgar A. Zingman

COURT OF APPEALS OF KENTUCKY
File No. F-213-69

PAUL BRANZBURG - - - - PETITIONER

V. **ORDER**

J. MILES POUND, JUDGE, JEFFERSON CIRCUIT COURT, CRIMINAL BRANCH, SECOND DIVISION, - - RESPONDENT

The motion of the Petitioner for the court to stay for ninety days the effective date and enforcement of its order herein is denied this 25th day of January 1971.

Concurring: Judges Hill, Milliken, Palmore and Reed. Steinfeld, J., dissents.

/s/ James B. Milliken,
Chief Justice,
Court of Appeals of Kentucky

The Courier-Journal & Times, Louisville, Ky.—Sunday Morning, January 10, 1971

POT PROBLEM BYPRODUCT: DISRESPECT FOR THE LAW

By PAUL M. BRANZBURG
Courier-Journal Staff Writer

Frankfort, Ky.—Marijuana IS dangerous—in ways that few legislators, educators and public officials suspect.

Talks with a few dozen of Frankfort's pot smokers leave these impressions:

√They have less respect for the law because they consider Kentucky's criminal laws against marijuana ignorant and unfair and transfer their cynicism to laws and lawmakers in general.

√Because pot smokers feel that drug education materials used in Franklin County high schools are filled with

New analysis

distortion and propaganda, some are questioning the educational system itself.

√Pot smokers regard the statements and actions of Kentucky officials about marijuana as a combination of stupidity and cheap politics, and many have become somewhat radicalized and suspicious of government as a result.

Pot Smokers Blame Legislators

Could it be that legislators, educators and government leaders are indirectly encouraging disrespect for law, edu-

cation and government by the way in which they have handled the marijuana issue?

An oversimplification, surely. But a reasonable man could easily come to that conclusion by talking to marijuana users in Frankfort.

To appreciate the young marijuana smoker's disenchantment with the marijuana laws, one only has to raise the subject—and listen to the vehement reply.

"It is the legislators themselves who are responsible for the so-called 'marijuana problem,'" says a state employe. "They've made pot illegal on the basis of no evidence."

"It is ridiculous to put people in jail for something not known to be harmful," says another state employe. "It may be proved to be dangerous, but until it is, it is not right to put people in jail for something that may be proven to be harmless."

(Researchers around the country are now trying to determine if marijuana is physically or psychologically dangerous.)

Some students even argue that law enforcement personnel actually condone the use of hard drugs in ghetto areas.

"It's chemical warfare, man," says a Kentucky State student. "Dugee (heroin) is put in the ghetto to make people passive. I've been able to get my hands on smack (heroin) ever since I was a freshman in high school. But I couldn't go buy a bottle of alcohol. It was easier to get dope than liquor."

The young marijuana users' disenchantment with drug education is every bit as profound as their disillusionment with the law.

Although it drew praise from many—young and old—Gov. Louie B. Nunn's Louisville drug conference on Dec. 3 was a farce, the Frankfort pot smokers say.

"They showed us this stupid film in school where a guy takes one puff of marijuana and then he looks into a mirror and he sees his face turn into a werewolf," laughs a 15-year-

old Franklin County High student. "And then the teachers wonder why kids go out and smoke pot."

"At the governor's drug conference," says a freshman college student, "they were propagating all kinds of myths—like the ridiculous myth that marijuana leads inevitably to the use of heroin. When they say things like that, the kids can only laugh. Even the National Institute of Mental Health has discredited that myth."

"My idea of drug education is to read enough so that when you use dope, you won't abuse it," says another college student.

"Yeah," says a friend. "But the governor's drug conference was a completely nonobjective downer on drugs. All they would talk about is bad effects. They would never have an objective discussion of drug use. Like the pros and cons of marijuana. Like the difference between people who use drugs maturely, and those who abuse them."

Several youngsters in Franklin County say they went to the governor's conference stoned on marijuana. And they are probably telling the truth.

The Courier-Journal & Times, Louisville, Ky.—Sunday Morning, January 10, 1971

ROPE TURNS TO POT

Once an Industry, Kentucky Hemp Has Become a Drug Problem

By PAUL M. BRANZBURG
Courier-Journal Staff Writer

Frankfort, Ky.—On a lonely stretch of road on the outskirts of this city, there is an historical marker entitled "Franklin County Hemp." It tells passing motorists that hemp was once Kentucky's largest cash crop, that the gloomy buildings nearby were "the last hemp factory to operate in Kentucky, closing down in 1952."

However, the history of Franklin County hemp did not come to an end in 1952.

It is true that the stalk of Kentucky hemp is no longer used to make rope for the rigging of American sailing vessels, to make bags to hold the South's cotton. But a growing number of youths in and around Kentucky's capital city are now harvesting the plant and smoking the leaves.

The leaves are known as marijuana.

Unlawful drug use has come to the small cities of the commonwealth.

Indeed, Gov. Louie B. Nunn noted at his drug information conference, held five weeks ago in Louisville, that illegal drug use may be growing faster in small towns and rural areas than in major cities.

Based on area interviews

To find out more about this phenomenon, a reporter selected Frankfort—with a population of about 23,500—and spent two weeks interviewing several dozen drug users in the capital city. He also saw a number of them smoking marijuana.

Based on those interviews and observations, here's a look at the drug scene in Frankfort:

Within the last two years, the use of pot has become commonplace among a minority of Frankfort youth. An even smaller number are using hallucinogenic drugs (such as LSD and mescaline), amphetamines (stimulant drugs known popularly as "pep pills" or "diet pills") and barbiturates (depressant drugs commonly called "sleeping pills").

Heroin is beginning to trickle into Frankfort, although apparently few or none have become addicted.

As elsewhere in Kentucky and the nation, illegal drug use knows no age, class or racial boundaries.

Most users are in their teens and 20s, but this writer spoke to Frankfort pot smokers as young as 4 and as old as 40-plus.

The "typical" unlawful drug user in Frankfort is a middle-class high school or college student, but interviewed marijuana smokers included:

√A middle-level state government official who sold $300 worth of pot last summer and has tried LSD.

√A young Frankfort professional.

√A well-known and highly respected Frankfort resident who recently arranged a marijuana purchase within the capitol building.

√Two state government employes with jobs involving planning and testing.

"I think it's more of a problem than the average citizen thinks," Frankfort Police Chief Douglas L. True, said. "But I don't think Frankfort stands out above all the rest of the cities. It's a problem, not only in Frankfort, but everywhere."

Illegal drug use in Frankfort is far more limited than in other cities—Louisville and Lexington, for example—and there is nothing to justify hysteria.

Specifically, on the basis of interviews with Frankfort drug users, here is a conservative estimate of the scope of this city's illegal drug activity:

At Franklin County High School, with a student population of 1,622, there are 50 to 100 students who smoke marijuana at least once a month. About another 100 students have tried pot but do not use it regularly.

Of the 50 to 100 who do, 10 to 20 students use amphetamines and barbiturates when available, and about 10 use LSD when they can get it. At least two students have injected heroin at least once.

"I'm surprised," said Robert W. Hoagland, the principal, when told of these estimates. "I would have said 25 to 50 either have used or are using drugs. But that's just a guess."

Recently John Lykins, basketball coach at Franklin County High School, distributed drug use questionnaires to

students. No fewer than 157 admitted anonymously that they had "tried drugs."

Hoagland and Lykins say the reliability of the survey is in doubt because some students did not take it seriously, but Lykins estimates that "80 per cent to 90 per cent of the students were telling the truth."

"We don't think that the survey is good public relations for our school," says Lykins. "We don't want parents to think that students are using drugs left and right at Franklin County High—because it isn't so."

At Frankfort City High School, with a student body of 418, probably no more than 25 students smoke pot with any regularity. And just a handful use more potent drugs.

In a recent school-sponsored survey of students at the city high school, 57 students said they had tried pot, 83 thought it should be legalized, 23 said they had used harder drugs than pot, and 139 said they knew where to buy illegal drugs if they wanted them.

"If there are drugs in the community, there will be drugs in the school," says O. C. Leathers, Jr., the principal. "But, outwardly, I haven't been able to see any sign of it—we haven't had any discipline problems or stealing to get money."

At Kentucky State College about 90 of the 900 boarding students smoke pot regularly, according to the more conservative estimates of KSC marijuana users. And at least 300 others have tried it in the past. There is almost no amphetamine or barbiturate use among the boarding students, but about 10 will sniff heroin or cocaine when those drugs are available. A handful use mescaline and LSD, when available.

Small community of users

"If somebody came by with 50 caps (capsules) of 'dugee' (heroin), man, it would be gone in two days," said a student who is fond of "tooting" (sniffing) heroin.

"Dugee"—pronounced DO-gee—and "tooting" are Negro jargon. The corresponding lingo among white users is "smack" and "snorting.")

Frankfort also has a small community of about 30 who use drugs.

It includes "hip" people several years out of high school, a few commuting Kentucky State students, a few high school students, a few professionals (with short hair), and so on. Marijuana is the primary drug of this group, but a few use amphetamines regularly.

Although Franklin County has several hundred illegal drug users, it would be hard to characterize the situation as a "critical drug problem." This is partly because of the self-restraint and conservatism of the users themselves.

Most users limit themselves to marijuana. The typical Frankfort user is an occasional user, confining his drug intake to weekends. Nearly all avoid the use of hypodermic needles.

'Should be . . . secondary'

And even those who use amphetamines and barbiturates give every evidence of going through an "experimentation stage" in which they are eager to experience all types of drugs.

"I feel drugs should be a secondary thing," a Frankfort High student said. "The trouble with some kids is that they make it a primary thing."

Those in Frankfort most likely to make it "a primary thing" are the high school students. Some of them talk of little else but drugs. Some boast of totally fool-hardy consumption of drugs. A few are just plain reckless.

"I was doing speed (amphetamine) one night and finally I just wanted to stop speeding," a 15-year-old Franklin County High student recalled. "So I took a yellowjacket (Nembutal, a barbiturate) to come down and then I started bumping into walls."

An increasing number of Frankfort's unlawful drug users will occasionally get stoned on pot before going to school or work.

A state official recalls that "at a planning conference my supervisor presented an argument and I couldn't put together a good answer and so I realized that I had to limit my use. Now I fit it into what I want to do in terms of work production."

A freshman at the county high school admits that "sometimes I can't remember my locker combination because I'm so stoned." (Displaying the same poor judgment, he later offered this reporter a marijuana cigarette.)

Other students claim they have little difficulty going to classes stoned.

"There are some instructors who feel it is mandatory to attend their classes," a Kentucky State student said. "If their classes are bad, and you know the material, you've got to do something to bear with it.

"Either you go to class and listen to the _____, or you go stoned and concentrate on something else. You wear your shades (sunglasses) and you wear your high."

Some curious, some rebel

(A chronic marijuana smoker often has bloodshot eyes—thus the sunglasses. Researchers have found that marijuana does not dilate the pupils of the eyes, as many potheads and narcotics agents have claimed.)

A Kentucky State student from a large East Coast city said his occasional heroin sniffing has not caused him any problems, but said he knows a few students "you might call strung out (addicted)—not to the point where they get sick, but where they need it psychologically."

Why do they start using drugs?

Curiosity is a common reason for the initial experimentation.

"If a kid has any curiosity at all, he'll try the pot to see what it is like," said Dr. John Parks, a psychiatrist on the staff of the Comprehenhive (sic) Care Center in downtown Frankfort. "He isn't supposed to do these things, so he damn well will."

In the early stages of experimentation, a few may be attracted to drugs for rebellious reasons.

"You enjoy pulling the wool over your parents' eyes, over the law, and you enjoy going to school stoned and nobody has the slightest idea," said a college student who was graduated from Franklin County High. "And it is even better when you get good grades.

"But later it is no longer for rebellion. Because if rebellion is your motivation, you'll be defiant and do your damn best to talk and tell people about it—and then you'll get busted (arrested)."

Some say they smoke pot because there aren't many other forms of entertainment in Frankfort.

"It's also what's happening," said a KSC student in a room filled with marijuana smoke. "It's what people are doing. And it is much better than what students used to do—get drunk."

Among the high school students, perhaps the most important causative factor is the desire to be accepted by the group that uses drugs.

Why do they continue?

The attraction is primarily to the group, secondarily to drugs. Because it is a drug-using group, new initiates use drugs to gain acceptance.

At Franklin County High, the group tends toward longer hair, a trace of hip mannerisms, a bit of hip jargon. They regard themselves as freer spirits, less uptight, more enlightened. They label students with more traditional values "rednecks."

Once they have tried drugs, why do some continue to use it?

The pot smokers, like occasional alcohol drinkers, do it for a remarkably uncomplicted reason: they enjoy it and see nothing wrong with it. But, like a minority of alcohol drinkers, a minority of Frankfort pot smokers abuse marijuana and allow it to become overly important in their lives.

"Pot is a good experience," said a KSC student, glancing out the window of his dormitory room. "It allows me to look at things in a different perspective. Like now I'm more sensitive to sounds. You can appreciate music better with good grass. You get a feeling of well-being. With alcohol you are just out of your head, but marijuana allows you to think about things."

Marijuana is overwhelmingly the main unlawful drug used in Frankfort. The harder drugs are irregular in supply and appear to be used primarily for experimentation and occasional use.

Few in Frankfort who have used dosages of amphetamines and barbiturates (these drugs are legal when prescribed) in quantity sufficient to become high are likely to argue the virtues of these drugs. They know the dangers as well as any narcotics agent. Better, perhaps.

"I don't like speed," a 16-year-old girl at the county high

Staff Photo

(Photo omitted)

A SPOTLIGHT shines on a speaker at the recent state conference on drug abuse at Louisville's Convention Center.

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school said. "It damages your body and it isn't a good high. You get so tired, and you use the bathroom 1,000 times, and your mouth gets so dry."

The same attitude is almost universal about heroin.

"Smack is death," said a KSC student, sitting in his room—stoned on grass. "I've seen what it's all about at home."

Most of Frankfort's pot smokers have not tried hallucinogenics. Those who have are ambivalent. They talk about the ecstasies of LSD and mescaline, but they caution about the possibility of a bad trip.

Where do the drugs come from?

Most of the marijuana is picked in Franklin County and other nearby counties. The young people pick it and then give it away or sell it.

Traffic unorganized

The quality of the marijuana is poor and it cannot be sold for much—$10 an ounce at the very most.

(It may take three or more "joints" (cigarettes) of Franklin County marijuana to begin to get stoned, while one joint of good Mexican pot may get five people thoroughly stoned).

There is little organization to drug traffic in Frankfort. A college student brings some from home after Christmas vacation. A high school student picks marijuana in the fall, gives some away, sells a little.

A few students and longhairs are "dealers" only in the sense that they sell with more regularity than others. They make money at it, but probably no more than a few hundred dollars.

Some Frankfort citizens suspect that KSC students are primarily responsible for drugs in the capital city. Not so. Most of the 900 boarding students at KSC are Negro, and so these students and Frankfort have little to do with one another. Only a handful of KSC students know the longhairs downtown.

Other sources of drugs are Cincinnati, Louisville and, especially, Lexington. According to Frankfort drug users, there are student dealers at the University of Kentucky and still more dealers in the longhair community surrounding UK.

Medicine cabinet a source

A state government official said he made $300 selling marijuana last summer.

"I was just financially pressed," he said. "So I sold three pounds at about $60 each and 10 lids (ounces) at $10 each. When I saw I was getting into dealing, it made me think—'What are you getting into?' I realized it wasn't an excitement thing. I just needed the money."

Another source of drugs is the home medicine cabinet. Some youngsters simply get their pills from bottles their parents have long since forgotten.

Like "black beauties," a black amphetamine capsule whose trade name is Biphetamine. Like "red devils," a red barbiturate capsule whose trade name is Seconal.

"One guy's father had a speed prescription," said a Franklin County High student. "So he took his father's pills and used them. Then he told his father, 'Dad, those things are dangerous. I read about them. So I threw them away for you.'"

What about his own father? "My father thinks I'm an all-American Kid," he said confidently. "He doesn't suspect anything."

Frankfort's drug users are fearful about arrest, but not very much.

There have only been 11 drug arrests in Franklin County in the last year, according to state and city police.

Police 'just' react

Until recently, neither department seemed to have the manpower, specialized training or money to tangle with drug investigations.

"The Frankfort police have never raided anybody," said a Frankfort professional who smokes pot. "They don't act on things; they just react to complaints. Like if a mother calls in and complains."

"I was once in a restaurant next to Frankfort police headquarters," a state employe said. 'I was stoned and a few joints fell out of my pocket. A cop looked at them and said, 'Uh, he rolls his own cigarettes.' He didn't know."

Frankfort Police Chief Douglas L. True said one of his problems is that he has only 35 men on his force.

"And this isn't an easy matter to detect," he said. "A person who uses drugs doesn't do it publicly.

"Also, this is a rather new field for us. Police in towns this size traditionally work in other areas."

Chief True said he is pleased that the state police are organizing a narcotics squad. He predicted that this will cut down on unlawful drug use in Frankfort.

"And it grows wild around here," he said. "We used to have a hemp factory here and people used to grow it in this vicinity as a cash crop."

Some still do.

FRANKLIN CIRCUIT COURT

GRAND JURY SUBPOENA

THE COMMONWEALTH OF KENTUCKY

To the Sheriff of Jefferson County, Greeting:

You are commanded to summon Paul Branzburg, Louisville Courier Journal, Louisville, Kentucky to appear before the Grand Jury of Franklin County on the 18th day of January, 1971 at 1:00 p.m., to testify in the matter of violation of statutes concerning use and sale of drugs.

Witness JAMES E. COLLINS, Clerk of said Court, this 14th day of January, 1971.

/s/ James E. Collins, Clerk

FRANKLIN CIRCUIT COURT

IN THE MATTER OF PAUL BRANZBURG

MOTION TO QUASH GRAND JURY SUBPOENA

Comes now the Movant, Paul Branzburg, by counsel, and moves the Court that the Grand Jury subpoena issued January 14, 1971, and served upon him on January 16, 1971, be quashed and that the Movant be excused from testifying before the Franklin County Grand Jury.

As grounds for said Motion Movant states that the subpoena calls upon him "to testify in the matter of violation of statutes concerning use and sale of drugs." It would appear that this subpoena is the result of an article appearing in the Courier-Journal and Times of Louisville on Sunday morning, January 10, 1971, written by the Movant. That article dealt with the use and sale of drugs in Franklin County.

The Movant is employed as a reporter for the Courier-Journal in Louisville, Kentucky. For some time he has specialized in articles dealing with the use and sale of drugs in various locations in the Commonwealth. In order to acquire the information set forth in these articles he has gradually won the confidence and trust of those engaged in such activities or having knowledge of such activities. These confidences have enabled him to write informed and balanced stories concerning drug use which would be unavailable to most other newsmen. If Mr. Branzburg were required to disclose these confidences to the Grand Jury, or any other person, he would thereby destroy the relationship of trust which he presently enjoys with those in the drug culture. They would refuse to speak to him; they would become even more reluctant than they are now to speak to any newsman; and the news media would thereby be vitally hampered in their ability to cover the views and activities of those involved in the drug culture.

The inevitable effect of the subpoena issued to Mr. Branzburg, if it not be quashed by this Court, will be to suppress vital First Amendment freedoms of Mr. Branzburg, of the Courier-Journal, of the news media, and of those involved in the drug culture by driving a wedge of distrust and silence between the news media and the drug culture. This Court should not sanction a use of its process entailing so drastic an incursion upon First Amendment freedoms in the absence of compelling Commonwealth interest in requiring Mr. Branzburg's appearance before the Grand Jury. It is insufficient merely to protect Mr. Branzburg's right to silence after he appears before the Grand Jury. This Court should totally excuse Mr. Branzburg from responding to the subpoena and even entering the Grand Jury room. Once Mr. Branzburg is required to go behind the closed doors of the Grand Jury room, his effectiveness as a reporter in these areas is totally destroyed. The secrecy that surrounds Grand Jury testimony necessarily introduces uncertainties in the minds of those who fear a betrayal of their confidences. The sensitive news sources developed by Mr. Branzburg place no price or exaction upon their continuing relationship save confidence in the discretion of Mr. Branzburg. In the nature of things that confidence is destroyed with the closing of the doors to the Grand Jury room behind a reporter. When, in a case such as this, there is a conflict between the rights of secret interrogation of the Grand Jury and basic First Amendment rights, it becomes appropriate to inquire into the need here for the particular incursion. Clearly, the thrust here is to make the reporter an investigative arm of the police. First Amendment freedoms cannot long survive in such a role.

Recently the United States Court of Appeals for the Ninth Circuit in the case of *Earl Caldwell and New York Times Company* v. *United States of America* (November

16, 1970) (unreported as yet), dealt with a situation exactly the same as involved here. That Court held that the reporter should not be required to enter the Grand Jury room. Our own Court of Appeals of Kentucky is presently considering the application of that case to an earlier matter involving your Movant here, the case of *Paul Branzburg* v. *J. Miles Pound* (November 27, 1970, Petition for Rehearing under consideration).

Movant's rights clearly are protected under the First and Fourteenth Amendments to the Constitution of the United States, Sections 1, 2 and 8 of the Constitution of Kentucky and KRS 421.100.

Wherefore, on the basis of the First and Fourteenth Amendments to the Constitution of the United States, Sections 1, 2 and 8 of the Constitution of Kentucky and KRS 421.100, the Movant respectfully prays that this Court enter an Order quashing the subpoena in question and excusing the Movant from entering the Grand Jury room in connection with any investigation into "the matter of violation of statutes concerning use and sale of drugs."

WYATT, GRAFTON & SLOSS
Third Floor
Marion E. Taylor Building
Louisville, Kentucky 40202
/s/ Edgar A. Zingman
Counsel for Movant

FRANKLIN CIRCUIT COURT

IN THE MATTER OF PAUL BRANZBURG

ORDER

Motion denied, subject to entry of a protective order in accordance with the opinion of the Court of Appeals for the Ninth Circuit in the case of *Caldwell* v. *United States*,

such Order to be considered at 4 Pm, (sic) Friday, January 22, 1971.

/s/ Henry Meigs, Judge,
Franklin Circuit Court

Eneterd (sic) January 18, 1971

FRANKLIN CIRCUIT COURT

IN THE MATTER OF: PAUL M. BRANZBURG

PROTECTIVE ORDER

Paul M. Branzburg, Staff Writer for the Louisville Courier Journal, having been subpoenaed to testify before the January 1971 Franklin County Grand Jury, and he having, by counsel, moved to quash said subpoena, and the Court having heard arguments of counsel for Paul M. Branzburg and the Commonwealth, and the Court being advised, It Is Hereby Ordered:

1. That Paul M. Branzburg shall not be required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination to the public through the press or other news media.

2. That specifically, without limiting paragraph 1, Paul M. Branzburg, shall not be required to answer questions concerning statements made to him or information given to him by persons interviewed by him unless such statements or information were given to him for publication or public disclosure.

3. That, to assure the effectuation of this order, Paul M. Branzburg shall be permitted to consult with his counsel at any time he wishes during the course of his appearance before the Grand Jury.

4. That nothing in paragraphs 1, 2 and 3 of this order shall be construed to permit Paul M. Branzburg to refuse to answer any questions which concern or pertain to any criminal act, the commission of which was actually observed by Paul M. Branzburg. In accordance with the foregoing, the Motion to Quash the Subpoena is hereby overruled.

ENTERED this 22nd day of January, 1971.

/s/ Henry Meigs,
JUDGE, Franklin Circuit Court

IN THE

COURT OF APPEALS OF KENTUCKY
ORIGINAL NO. W-29-71

PAUL BRANZBURG - - - - PETITIONER

vs.

HENRY MEIGS, Judge, Franklin Circuit Court, Franklin County Courthouse, Frankfort, Kentucky - - - RESPONDENT

PETITION FOR TEMPORARY AND PERMANENT RESTRAINING ORDER AND WRIT OF PROHIBITION

Comes now Paul Branzburg, by counsel, pursuant to R.C.A. 1.420 and C.R. 81, and for his petition states as follows:

(1) The Respondent against whom relief is sought is the Honorable Henry Meigs, Judge, Franklin Circuit Court, Franklin County Courthouse, Frankfort, Kentucky.

(2) The facts entitling Petitioner to relief are:

(a) Petitioner is an individual employed as a news reporter by the Courier-Journal & Louisville Times Company, a Kentucky corporation.

(b) Petitioner's duties as a reporter require Petitioner to seek out and contact sources of news information, to then write stories based upon the facts he has observed and to have such stories published in the newspapers published by his employer in Jefferson County, Kentucky for distribution and sale in Jefferson County, Kentucky, throughout the Commonwealth of Kentucky, including Franklin County, Kentucky, and in various places in the United States. Many of the facts obtained for said stories are gained solely through confidential sources of information, and, but for reliance on Petitioner's agreement to keep said sources confidential, this information would not be disclosed to the Petitioner.

(c) In the January 10, 1971, issue of the Courier-Journal and Louisville Times, there appeared a story written by Petitioner based upon information confidentially acquired concerning the use of illegal drugs and narcotics in Franklin County, Kentucky. A copy of the story is attached hereto and made a part of this petition. The information acquired for use and publication in said story was gained confidentially by Petitioner in his capacity as a newspaper reporter.

(d) On January 18, 1971, the Petitioner was subpoenaed to appear before a grand jury sitting in Franklin County, Kentucky, to be examined concerning the events and matters which became known to him in the course of his duties as a reporter.

(e) On January 18, 1971, the Petitioner appeared before the Respondent, moved that the subpoena served upon him be quashed, and moved that he be excused from appearing before the Franklin County Grand Jury. Said motions were based upon Petitioner's privilege under the First and Fourteenth Amendments to the Constitution of the United

States as interpreted by the United States Court of Appeals for the Ninth Circuit in *Caldwell* v. *United States*, No. 26,025 (Nov. 16, 1970), upon Petitioner's privilege under Sections 1, 2 and 8 of the Constitution of the Commonwealth of Kentucky, and upon KRS 421.100.

(f) After hearing arguments of counsel, the Respondent overruled Petitioner's motions and directed that Petitioner appear before the Grand Jury and answer the questions posed to him by the Grand Jury. Respondent further announced that in event the Grand Jury should report to the Respondent that the Petitioner had refused to answer questions, the Respondent would pursue the provisions provided for dealing with contempts of court.

(g) If Petitioner is forced to appear before the Grand Jury, or forced to disclose any information given to him in confidence, he will suffer serious and irreparable harm and damage, because his ability to procure confidential information will be severely limited or destroyed.

(3) The Respondent's action in ordering the Petitioner to appear before the Grand Jury is clearly violative of his rights and privileges as provided under KRS 421.100 and under Sections 1, 2 and 8 of the Constitution of the Commonwealth of Kentucky and the First and Fourteenth Amendments of the Constitution of the United States of America. It is an interference with the exercise of freedom of the press and would permit courts to destroy that confidential relationship which is essential to a free press and which has been provided for by the Legislature of the Commonwealth of Kentucky and the Constitution of the United States.

(4) The Petitioner, by counsel, respectfully prays that a writ issue from this Court requiring that:

(a) The Respondent, the Honorable Henry Meigs, Judge, Franklin Circuit Court, Franklin County Courthouse, Frankfort, Kentucky, be restrained and prohibited from proceeding against the Petitioner in the matter of

contempt proceedings growing out of the exercise by the Petitioner under his privilege under KRS 421.100 and the Constitutions of the Commonwealth of Kentucky and of the United States of America, be ordered to sustain the Petitioner's motions to quash the subpoenas, and be ordered to excuse the Petitioner from appearing before the Grand Jury.

(b) That the entire matter be set down for hearing at a time to be set by this Court for determination upon a permanent writ against the Respondent.

(c) All other necessary and proper relief to which the Petitioner shall appear entitled.

Respectfully submitted,

Wyatt, Grafton & Sloss
300 Marion E. Taylor Building
Louisville, Kentucky 40202
582-1881

Counsel for Petitioner

/s/ Edgar A. Zingman
/s/ Robert C. Ewald

The Affiant, Paul Branzburg, states that he has read the foregoing petition, and that the statements contained therein are true as he verily believes.

/s/ Paul M. Branzburg

(Jurat and Certificate of Service omitted in printing)

(Title omitted in printing)

AFFIDAVIT

Commonwealth of Kentucky }
} ss
County of Jefferson }

Paul M. Branzburg, being first duly sworn states as follows:

He makes this Affidavit in support of the Petition for a Writ of Prohibition in the above matter.

He is 29 years old and for the last 3½ years has been employed at the Louisville Courier-Journal. He is employed in investigative reporting as a member of a special assignment group at the newspaper.

Prior to his employment, he attended Cornell University from which he received an A.B. in 1963, the Harvard Law School from which he received a J.D. in 1966, and the Columbia University Graduate School of Journalism from which he received an M.S. Cum Laude in 1967.

Since his employment by the Louisville Courier-Journal he has written, among others, investigative stories dealing with the use of narcotics, abuse and falsification of agricultural payments, federal, state and local meat inspection programs, automobile thefts, and burglaries.

His work has been recognized on numerous occasions, including receipt of the 1968 Public Affairs Reporting Award of the American Political Science Association for a series on meat inspection; the 1970 Public Affairs Reporting Award of the American Political Science Association for a series on drug use; the 1969 Indiana Associated Press Managing Editors Award for the best feature story written in the State of Indiana that year in its classification; a Certificate of Outstanding Merit representing the I.N.G.A.A.-University of Missouri Business Journalism Award for his stories dealing with abuses under the agricultural subsidy program. He has twice been nominated

for the Pulitzer Prize based upon stories dealing with drugs and with the agricultural subsidies.

Approximately four to five weeks prior to the publication of the story dealing with drug use in Frankfort, Kentucky, he began the preparation of this story. The process of developing such a story is a complicated and tedious one. Information is obtained by moving from contact to contact. This mechanism becomes possible only to the extent that those having information develop trust and confidence in the reporter and develop a feeling of security that their identities will be protected. In the case of the Frankfort story of January 10, 1971, his original contacts led to introductions to persons active and knowledgeable in the drug culture in Frankfort. In other instances, without prior contact, he sought out persons in various locations in Frankfort and managed to develop these on his own. With the passage of time and growing confidence in these relationships, many of these led to additional contacts. The overriding determinant for development of the information was the assurance that the identity of those furnishing him information would not be disclosed. Almost uniformly, the first thing discussed would be the confidentiality of the identity of the informant. Prior to the Court of Appeals decision now under Petition for Rehearing in the case of *Branzburg* v. *J. Miles Pound*, he would show his contacts a copy of KRS 421.100 or explain the substance of the statute. Generally, this satisfied the contacts. Since the Court of Appeals decision, *supra*, much more discussion has been necessary. He has had to convince his contacts that they could rely upon him not to disclose their identities notwithstanding the Court of Appeals opinion. Once this issue is settled another issue that must be worked out is the manner of identification of the contacts in any story he might write. The descriptions used in the stories are generally the result of specific discussion and agreement with his contacts.

These descriptions are intended to protect the identity of the contact. In many instances the contacts seek assurance that if it comes to that point he will go to jail rather than to disclose their identity. In essence, the ability to obtain the information is dependent upon his ability to convince his contacts that they will not be identified through him.

Notwithstanding this, there always remains some measure of distrust upon the part of these individuals. The very fact of going behind the Grand Jury doors, therefore, would lead to suspicion upon their part and an unwillingness to cooperate further. If this Grand Jury appearance were then followed by arrests, these could lead to the possibility of a complete loss of his sources, [illegible]bility to establish future contacts and even violence. Until the identity of the actual informer was disclosed as a result of testimony at a trial of individuals indicted, he would be under a cloud of suspicion and his effectiveness and ability to operate would be destroyed. In the case of search warrants resulting in arrests and seizure of contraband, the identity of the informer might never be disclosed, which would leave him under a permanent cloud.

Since the onset of these Grand Jury proceedings and the attendant publicity resulting from them, he has already begun to experience the difficulties and the problems referred to above in connection with his investigative reporting activities in other communities. Possible contacts have in some instances refused to discuss drug use with him. In other instances they have seriously questioned whether he can offer them any protection or whether this offer of protection is worth anything in the face of the narrow legal protection granted by this Court and the likelihood that his refusal to go before the Grand Jury would produce a jailing for contempt. In the short period of time these proceedings have been pending, it has been conclusively demonstrated to him that his ability to continue to do the kind of investigative reporting which he has performed in the past has

been grievously restricted. In his judgment if this situation is not remedied by granting to reporters the privilege not to go behind the doors of the Grand Jury to testify concerning the reporter's investigative activities, the ability to provide this kind of story will be destroyed.

/s/ Paul M. Branzburg

(Jurat omitted in printing)

IN THE

COURT OF APPEALS OF KENTUCKY

W-29-71

PAUL BRANZBURG - - - - PETITIONER

V.

HENRY MEIGS, JUDGE, FRANKLIN CIRCUIT COURT - - - - RESPONDENT

ORDER DENYING PROHIBITION AND MANDATORY RELIEF

This cause is before this court on a petition for temporary and permanent orders of prohibition and a petition for mandatory relief. The petition for a temporary order of prohibition, a permanent order of prohibition and mandatory relief is denied. An opinion will follow.

ENTERED THIS 22nd DAY OF JANUARY, 1971

/s/ James B. Milliken
CHIEF JUSTICE

RENDERED: JANUARY 22, 1971

COURT OF APPEALS OF KENTUCKY

PAUL BRANZBURG - - - - - PETITIONER

v. IN COURT OF APPEALS

HENRY MEIGS, JUDGE, FRANKLIN CIRCUIT COURT, FRANKFORT, KENTUCKY - - - - - - RESPONDENT

OPINION OF THE COURT BY COMMISSIONER VANCE DENYING PETITION FOR ORDER OF PROHIBITION

The petitioner, Paul Branzburg, is a reporter for the Courier-Journal and Louisville Times Company, a publisher of newspapers in Louisville, Kentucky, with statewide circulation. On January 10, 1971, there appeared in the Courier-Journal and Louisville Times a story written by petitioner based upon information acquired by him concerning the use of illegal drugs and narcotics in Franklin County, Kentucky.

On January 18, 1971, the petitioner was subpoenaed to appear as a witness before the Franklin County grand jury to testify in the matter of violation of statutes concerning use and sale of drugs. On that same day, petitioner filed in the Franklin Circuit Court a motion to quash the grand jury subpoena and sought to be excused from appearing before the grand jury.

The motion to quash was denied and petitioner is now faced with contempt proceedings if he fails to appear before the grand jury as directed. This original action seeks an order prohibiting the judge of the Franklin Circuit Court from proceeding against the petitioner by contempt pro-

ceedings and directing said judge to sustain petitioner's motion to quash the subpoena.

Petitioner asserts that he is entitled to this relief by reason of KRS 421.100, §§ 1, 2, and 8 of the Kentucky Constitution and the First and Fourteenth Amendments of the United States Constitution.

KRS 421.100 is a statute providing in substance that no person may be compelled to reveal the source of any information procured or obtained by him and published in a newspaper or by a radio or television station with which he is connected. This statute, interpreted recently by this court in *Branzburg* v. *Pound, Judge,* Ky., ____ SW 2d ____ (1970), grants a privilege against revealing the source of a reporter's information but does not protect the information itself and does not purport to offer immunity from subpoena.

Sections 1 and 2 of the Kentucky Constitution are not directly related to freedom of the press and in the arguments before this court, the petitioner has not suggested the manner in which either of these sections affords him relief in the present situation.

Section 8 of the Kentucky Constitution provides:

> "Printing presses shall be free to every person who undertakes to examine the proceedings of the general assembly or any branch of the government, and no law shall ever be made to restrain the right thereof. Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty."

This section has been construed by this court in the following language:

> "By the provisions of the United States and the state constitutions guarantying [sic] the 'freedom of the press' it was simply intended to secure to the conduc-

tors of the press the same rights and immunities that are enjoyed by the public at large. The citizen has the right to speak the truth in reference to the acts of government, public officials, or individuals. The press is guaranteed the same right, but no greater right. The citizen has the right to criticise [sic] the acts of the government, provided it is with the good motive of correcting what he believes to be existing evils, and of bringing about a more efficient or honest administration of government. For like purpose and like motive he may criticise [sic] the acts of public officials; and, for the honest purpose of better subserving the public interests, he may criticise [sic] the fitness and qualifications of candidates for office, not only in respect to their ability, fidelity, and experience, but in respect to their honesty and personal habits. *The press has precisely the same rights, but no more.* (Emphasis ours.) *Riley* v. *Lee,* 88 Ky. 603, 11 SW 2d 713 (1889).[1]

The general weight of authority is that the First Amendment does not extend a privilege to a reporter's source of information. *Judy Garland* v. *Marie Torre,* 259 Fed. 2d 545 (2d Cir.) certiorari denied, 79 S. Ct. 237 (1953). The petitioner relies upon a new interpretation of the First Amendment announced in *Caldwell* v. *United States,* ____ Fed. 2d ____ (1970), a case decided by the United States Court of Appeals, ninth circuit, on November 16, 1970. In that case, Caldwell was a reporter for The New York Times who specialized in reporting news of the Black Panther Party. A federal grand jury investigating the *possibility* of Black Panther involvement in crime subpoenaed Caldwell as a witness. He moved to quash the subpoena and presented substantial evidence by affidavit from which it was

[1]This case refers to the Kentucky Constitution adopted in 1850 but Article 13, §9 of that Constitution relating to freedom of the press was for all practical purposes identical with §8 of the present Constitution.

concluded by the court that even his appearance before the grand jury would infringe the constitutional guarantees of the First Amendment in that (1) it would have a chilling effect upon and would therefore impede his ability to gather news and, (2) it would induce a form of self-censorship in that in deciding what to publish he would consider the possibilities of later subpoena.

The court held that these infringements upon First-Amendment freedom were not justified since it appeared from Caldwell's affidavit that he had no information which was not privileged by a protective order granted him by the district court judge.[2]

The posture of the case thus was that if the reporter appeared before the grand jury, First-Amendment rights would suffer and the government would gain nothing. But, on the other hand, if he were relieved of the obligation to appear, the government would lose nothing and First-Amendment rights would not suffer. A balancing of these competing rights led the court to quash the subpoena, holding, "that where it has been shown that the public's First-Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret grand jury interrogation, the government must respond by demonstrating a compelling need for the witness' presence before judicial processes properly can issue to require attendance."[3]

It is important to keep in mind that the issue is not the protection of the petitioner's source of information since those sources are protected by KRS 421.100. The only question here is whether, conceding the right to protect sources

[2]The district judge refused to quash the subpoena but did give Caldwell a protective order substantially similar to the protection given by KRS 421.100.

[3]We quote this language from the Caldwell opinion because of its reference to the *public's First-Amendment right to be informed*, whereas the express language of the First Amendment prohibits the enactment of any law abridging freedom of the press or freedom of speech.

of information, petitioner can be required even to appear before the grand jury?

Petitioner does not bring himself within the rule announced in *Caldwell*. Whereas Caldwell presented substantial evidence that his appearance before the grand jury would have a chilling effect upon his sources of information, the record before us contains no evidence other than petitioner's allegation that the general public, or the drug-using portion of it, would be so chilled by the mere appearance of Mr. Branzburg before a grand jury that it would cease speaking to him or furnishing information to him. The conclusion that such a chill would in fact occur is not necessary by implication for, after all, these people were speaking to him and furnishing information to him before he wrote the story in question and at that time they certainly had no assurance that he might not be required to appear at some time before a grand jury.

In the second place, a major factor in the *Caldwell* decision was an affidavit by Caldwell that he did not have any information which would not be privileged by the protective order and that his appearance before the grand jury would be an exercise in futility.

In this case, petitioner has not filed any similar affidavit and a reading of the story published by him regarding use of illegal drugs in Franklin County, Kentucky, would induce a reasonable belief of the probability that petitioner may have witnessed the commission of various crimes in Franklin County, involving either the sale, use or possession of drugs or narcotics. Thus we do not believe that petitioner is within the rule announced in *Caldwell* v. *United States*, supra.

Aside from this we have misgivings about the rule announced in *Caldwell*. It represents a drastic departure from the generally recognized rule that the sources of information of a newspaper reporter are not privileged under the First Amendment.

The grand jury, itself a bulwark of freedom specifically recognized by the United States Constitution, is deeply embedded in the philosophy of human rights, dating back to early English law. Historically its function has been the investigation of charges of crime, but it is not an arm of the police. It is an instrument of the people, which on one hand insulates citizens from over-zealous prosecution, yet on the other hand has broad power to investigate criminal activities and other matters detrimental to the public interest.

The proceedings before a grand jury are secret and one ground of justification for secrecy is the protection that it affords to those who may be the subject of investigation on charges which prove to be without merit.

In *Blair* v. *United States,* 250 U. S. 273 (1919), it was held that attendance before grand juries in answer to subpoena is a public duty which every person is bound to perform and that the personal sacrifice involved is a part of the necessary contribution to the welfare of the public.

Any restriction upon the right of a grand jury to compel attendance of witnesses before it is a direct and obvious impediment to its functioning, but whether compulsory attendance is an infringement of First-Amendment rights is much less evident. Some day a situation may arise in which compulsory attendance before a grand jury would so seriously jeopardize constitutional rights as to require quashing the subpoena, but such a situation is not presented by the facts of this case.

The speculation that the mere appearance of a news reporter before a grand jury might jeopardize his rapport with the segment of society known as the drug culture, causing its loss of confidence in him and thereby inhibiting his ability to obtain information, is so tenuous that it does not, in the opinion of this court, present an issue of abridgement [sic] of the freedom of the press within the meaning

of that term as used in the Constitution of the United States.

The petition for order of prohibition and order directing that subpoena be quashed is denied.

All concur.

Attorneys for Petitioner:

Edgar A. Zingman, Louisville, Ky.
Wyatt, Grafton & Sloss,
(300 Marion E. Taylor Bldg.)

(Title omitted in printing)

MOTION FOR AN ORDER STAYING THE EFFECTIVE DATE OF THE COURT'S ORDER

Pursuant to Rule 1.345 R.C.A., Petitioner Paul Branzburg, by counsel, for the reasons set forth in his Affidavit and the Memorandum filed herewith, respectfully moves the Court to stay the effective date and enforcement of its Order in the above styled actions for 90 days, to allow the Petitioner time to obtain a writ of certiorari from the Supreme Court of the United States.

WYATT, GRAFTON & SLOSS
Third Floor
Marion E. Taylor Building
Louisville, Kentucky 40202
582-1881

Counsel for Petitioner

/s/ Edgar A. Zingman

(Certificate of Service omitted in printing)

(Title omitted in printing)

MOTION FOR A TEMPORARY WRIT OF PROHIBITION

Petitioner, Paul Branzburg, by counsel, for the reasons set forth in his Affidavit and the Memorandum filed herewith in support of this Motion and the Motion for an Order staying the effective date and enforcement of the Court's Order, moves for a Temporary Writ of Prohibition against the Respondent, Henry Meigs, Judge, Franklin Circuit Court, to stay further action in this case to allow the Petitioner time to obtain a writ of certiorari from the Supreme Court of the United States.

Petitioner is technically without a remedy under Rule 1.345 R.C.A., in that there is no enforcement of this Court's Order from which a stay may be granted. However, inasmuch as the Rules of this Court were intended to provide relief in such a situation pending application to the Supreme Court of the United States for certiorari, Petitioner believes that a Temporary Writ of Prohibition would be an appropriate order.

WYATT, GRAFTON & SLOSS
Third Floor
Marion E. Taylor Building
Louisville, Kentucky 40202
582-1881

Counsel for Petitioner
/s/ Edgar A. Zingman

(Certificate of Service omitted in printing)

COURT OF APPEALS OF KENTUCKY

File No. W-29-71

PAUL BRANZBURG - - - - PETITIONER

V. **ORDER**

HENRY MEIGS, JUDGE, FRANKLIN CIRCUIT COURT - - - RESPONDENT

In this case we have heretofore denied the extraordinary relief sought in view of the limited time the present Franklin County Grand Jury will be in session the Petitioner's motion for a temporary prohibition against the respondent, Henry Meigs, Judge of the Franklin Circuit Court, to stay further action in this case to allow Petitioner to seek certiorari from the Supreme Court of the United States is denied this 25th day of January 1971.

Concurring: Judges Hill, Milliken, Palmore, Reed and Steinfeld.

/s/ James B. Milliken
Chief Justice, Court of Appeals of Kentucky

Supreme Court of the United States

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Paul M. Branzburg,

Petitioner,

vs.

John P. Hayes, Judge, etc., et al.

ORDER ALLOWING CERTIORARI. Filed May 3, 1971.

The petition herein for a writ of certiorari to the Court of Appeals of the Commonwealth of Kentucky is granted.

Supreme Court, U.S.
FILED
FEB 23 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. ~~1381~~ 70-85

PAUL M. BRANZBURG - - - - - - Petitioner

versus

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division - Respondent

AND

PAUL M. BRANZBURG - - - - - - Petitioner

versus

HENRY MEIGS, Judge, Franklin Circuit Court - - - - - - - - - Respondent

PETITION FOR CERTIORARI TO THE KENTUCKY COURT OF APPEALS

[redacted]

EDGAR A. ZINGMAN
ROBERT C. EWALD
JON L. FLEISCHAKER
WYATT, GRAFTON & SLOSS
300 Marion E. Taylor Building,
Louisville, Kentucky 40202,
Counsel for Petitioner

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. _____

PAUL M. BRANZBURG - - - - - *Petitioner*

v.

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division - - - - - - - - - - *Respondent*

AND

PAUL M. BRANZBURG - - - - - *Petitioner*

v.

HENRY MEIGS, Judge, Franklin Circuit Court - - - - - - - - - *Respondent*

PETITION FOR CERTIORARI TO THE KENTUCKY COURT OF APPEALS

BRIEF FOR PETITIONER, PAUL M. BRANZBURG

May it please the Court:

OPINIONS BELOW

The opinions of the Kentucky Court of Appeals are printed in Petitioner's Appendix at pages 31, 40 and 70, and have not yet been officially reported.

JURISDICTION

The date of entry of the judgments sought to be reviewed is January 22, 1971. This Court has jurisdiction to hear this case under the provisions of 28 U.S.C. ~~§1254(1)~~ 1257(3).

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the First Amendment to the Constitution of the United States prohibits a grand jury from compelling a reporter to disclose confidential information received by him in the course of his news gathering activities?

II. Whether the First Amendment to the Constitution of the United States prohibits a grand jury from creating a chilling effect upon a reporter's news gathering potential by compelling him to enter the grand jury room to respond to inquiry into information obtained by him confidentially in his capacity as a news gatherer.

CONSTITUTIONAL PROVISIONS

The Constitutional provision here involved is the First Amendment to the Constitution of the United States, which is set out verbatim as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment is made applicable to the state action here involved by reason of Section 1 of the

Fourteenth Amendment to the Constitution of the United States, which is set out verbatim as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This brief is filed on behalf of Paul M. Branzburg, against the Respondents, John P. Hayes, and Henry Meigs, who are judges in trial courts of general jurisdiction, the circuit courts in Jefferson County and Franklin County, Kentucky. In two separate actions the Respondents overruled the Petitioner's refusals to appear before a grand jury and to answer questions asked of him by a grand jury. His refusals were based on his rights under the First Amendment of the Constitution of the United States. Both courts announced that contempt proceedings would follow continued refusal. In each case the Kentucky Court of Appeals affirmed the rulings of the Respondents, and thereby authorized the Respondents to punish Petitioner for contempt of court in the event Petitioner failed to answer certain questions which he had objected to in one case, and

failed to appear before the grand jury in the other case. Pursuant to Rule 23.5 of this Court a single petition for writ of certiorari is filed covering both cases, because those two cases involve closely related questions.

Petitioner is an investigative reporter employed by the Louisville Courier-Journal, a daily newspaper published in Jefferson County, Kentucky. In his capacity as a reporter for said newspaper the Petitioner has made particular efforts to become acquainted with the "hippie community" in Jefferson County and other parts of Kentucky. The Petitioner had devoted several newspaper stories and articles to the problem of drug abuse within Jefferson County and other parts of Kentucky. The two newspaper articles which are the subject of the controversy here involved were the result of the Petitioner's efforts in this area.

The Respondents are circuit judges in Jefferson County and Franklin County, Kentucky. Under applicable Kentucky statutes, the grand jury for each county is convened in the circuit court of that county (Kentucky Revised Statutes, Chapter 29). Pursuant to the Kentucky Rules of Criminal Procedure 5.02 (Appendix, p. 19), the circuit court shall swear the grand jurors and charge them to inquire into any violation of the law which may come to their attention. Pursuant to Kentucky Rules of Criminal Procedure, Section 5.12 (Appendix, p. 20), when a witness before a grand jury refuses to testify or to answer a question put to him, the foreman shall state the refusal to the court in the presence of the witness. If the court

decides that the witness is bound to testify and the witness persists in his refusal, the court shall proceed against the witness as in cases of similar refusal in open Court. Pursuant to Kentucky Rules of Criminal Procedure, Section 5.06 (Appendix, p. 20), the attendance of witnesses in grand jury proceedings may be coerced as in other judicial proceedings.

The first of these two consolidated cases was brought in the Jefferson County Circuit Court, Criminal Branch, Second Division, before the Honorable J. Miles Pound, the predecessor of the Respondent, John P. Hayes.

The Petitioner wrote an article which appeared in the November 15, 1969, edition of the Courier-Journal (Appendix, p. 20). This article described with considerable detail the efforts of two young Louisville, Kentucky, residents in producing enough hashish from marijuana to net them an income of $5,000.00 for three weeks of work. The article included a photograph of a pair of hands working above a laboratory table containing what was identified as hashish. The article stated that the individuals involved had received a promise that their names would be held in confidence. The article also quoted one of the two as saying: "I don't know why I'm letting you do this story. To make the narcs mad, I guess. That's the main reason."

As a result of this article, the Petitioner was subpoenaed before the Jefferson County Grand Jury and was asked to identify persons mentioned in the newspaper article. The Petitioner refused to answer these questions, and pursuant to the applicable rules the

Petitioner was brought before the Circuit Judge, where the foreman of the grand jury read the following questions to the Judge which the Petitioner had refused to answer:

> 1. On November 12, or 13, 1969, who was the person or persons you observed in the possession of marijuana about which you wrote an article in the Courier-Journal on November 15, 1969?
>
> 2. On November 12, or 13, 1969, who was the person or persons you observed compounding marijuana, producing the same to a compound known as hashish?

After hearing argument of counsel, the Court required that the Petitioner answer these questions, and counsel for Petitioner objected to the Court's ruling on the basis of the freedom of press guarantees under the First Amendment to the Constitution of the United States (Appendix, p. 24).

Counsel for Petitioner immediately filed a petition for temporary and permanent relief against Judge Pound in the Kentucky Court of Appeals (Appendix, p. 26). On November 25, 1969, the Kentucky Court of Appeals granted a Temporary Order of Prohibition pending review of the case on its merits (Appendix, p. 30). The Petition requested relief pursuant to the First and Fourteenth Amendments to the Constitution of the United States, as well as a Kentucky statute, KRS 421.100 (Appendix, p. 19), which granted newspaper personnel immunity from disclosing "sources of information."

On November 27, 1970, the Kentucky Court of Appeals determined that the phrase "source of information" in the Kentucky statute did not protect information obtained by the reporter's personal observation, and thus decided that the Petitioner had no immunity under the statute in this particular case. The Court of Appeals also rejected the Petitioner's First Amendment arguments (Appendix, p. 31).

Pursuant to the rules of the Kentucky Court of Appeals, Petitioner filed a Motion to Reconsider based on the November 16, 1970, decision of the United States Court of Appeals for the Ninth Circuit in *Caldwell* v. *United States,* 434 F. 2d 1081. The Petitioner urged the Court to reconsider Petitioner's First Amendment arguments (Appendix, p. 40).

In the case involving the Respondent Meigs, the Petitioner wrote an article concerning the use of marijuana and other drugs in Franklin County, Kentucky, which appeared in the Courier-Journal & Louisville Times on January 10, 1971 (Appendix, p. 47).

Petitioner was subpoenaed to appear before the Franklin County Grand Jury on the 18th day of January, 1971, to testify in a matter of "violation of statutes concerning the use and sale of drugs" (Appendix, p. 59).

Petitioner appeared before Judge Meigs on January 18, 1971, and moved the Respondent to quash the grand jury subpoena and excuse the Petitioner from testifying before the Franklin County Grand Jury. Said motion was based on Petitioner's First Amend-

ment rights under the Constitution of the United States (Appendix, p. 60).

Judge Meigs denied the Petitioner's motion, but issued a protective order in regard to the testimony of the Petitioner before the grand jury (Appendix, p. 62).

Petitioner immediately filed with the Court of Appeals of Kentucky a petition requesting a writ prohibiting Judge Meigs from requiring Petitioner's appearance before the grand jury and mandamusing Judge Meigs to quash the subpoena issued by the grand jury (Appendix, p. 64).

On January 22, 1971, the Court of Appeals modified its opinion, (Appendix, p. 40) thus denying Petitioner's Motion to Reconsider in the *Pound* case, and also denied Petitioner's request for writs of prohibition and mandamus in the *Meigs* case (Appendix, p. 70). The Court of Appeals followed the *Meigs* order with an opinion in which it refused to recognize Petitioner's First Amendment rights in the particular situation involved and specifically rejected the holding of the Court of Appeals for the Ninth Circuit in *Caldwell, supra* (Appendix, p. 70).

Petitioner then moved for an order staying the effective date of the order of the Court of Appeals in both the *Pound* and *Meigs* cases until Petitioner could obtain a writ of certiorari from the Supreme Court, and Petitioner additionally moved for a temporary writ of prohibition against Respondent Meigs until a writ of certiorari from the Supreme Court could be obtained (Appendix, pp. 77 and 78). The Court of Ap-

peals denied the requested stays and writ (Appendix, pp. 79 and 80).

On January 26, 1971, Mr. Justice Stewart temporarily restrained Respondents from compelling Petitioner to appear before the grand juries in Jefferson County or Franklin County, Kentucky, pending petition for certiorari to the Supreme Court.

The Petitioner seeks a determination from this Court that he cannot be required to answer the questions posed to him by the Jefferson County Grand Jury and cannot be required to appear and give testimony before the Franklin County Grand Jury.

ARGUMENT

In the cases here presented the following circumstances exist which constitute special and important reasons for review on a writ of certiorari:

I. The decisions of the Kentucky Court of Appeals involve an important question of constitutional law which should be settled by this Court.

II. There is a conflict among the courts of appeals and state court decisions.

I

The Decisions of the Kentucky Court of Appeals Involve an Important Question of Constitutional Law Which Should Be Settled by This Court.

The Kentucky Court of Appeals has failed to recognize the fundamental principle upon which the Petitioner relies: That the First Amendment's shield of protection extends to cover confidentially received names of persons who supplied information for publication to news reporters. The Petitioner believes that the protection of such confidences is a fundamental part of the First Amendment protections, and while certain decisions of this Court clearly imply such protection, the issue has not been specifically dealt with, nor has the extent of said protection been clearly defined. The issue is one of great and immediate importance because of an increasing disposition of various governmental agencies to use news reporters as fact finding instruments, rather than relying on the government's own vast resources to seek out information.* The press cannot be utilized as an arm of law enforcement and at the same time fully carry out its constitutionally recognized function of informing the general public of the important issues of the day. For these reasons immediate review of this issue is necessary.

The Supreme Court has long recognized the important position that the First Amendment has in our soci-

*Indeed, the pattern exhibited here of disinterest by prosecutors until the matter is spread in the news media, followed by immediate grand jury inquisition of the responsibile reporters, raises the question whether the very objective is not to cut off the sources of these embarrassing disclosures.

ety. The "profound national commitment to the principal that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964), is threatened today by increasing pressure from both state and federal officials on members of the press to disclose information obtained by them for the purpose of preparing stories relating to issues of public concern and public debate.

This national commitment to a free exchange of ideas has been emphasized repeatedly by this Court. It has been said that the purpose of the First Amendment is to secure "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press* v. *United States*, 326 U. S. 1, 20 (1944), and that "the maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg* v. *California*, 283 U. S. 359, 369 (1931).

Increasingly, due to this pressure from state and federal officials, news reporters are being placed in the difficult position of having to make a choice between subjecting themselves to prison terms in order to keep the public fully informed about issues to which there is heated public debate, or self censorship of their own publications. Such self censorship, amounting in fact to a restraint on the press and freedom of speech due to the threat of state action, is inimical to the ideals

embodied within the First Amendment. This chilling effect on the exercise of First Amendment rights derives not only from the state's attempts to force the reporter to divulge his background information, but also from the prospect of the prosecution of news reporters by the state. Potential informants will be much less likely to speak to such reporters if in doing so they know the increased risk of exposure they present to themselves. The freedoms protected by the First Amendment

> are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. [*National Association for the Advancement of Colored People* v. *Button*, 371 U. S. 415, 433 (1963)]

The protection granted by the First Amendment to the freedom of the press has long been recognized as including more than merely the freedom to publish. It is obvious that the freedom to publish is meaningless if the freedom to obtain the information to be published is destroyed. The chilling effect upon a reporter's ability to obtain information from unorthodox or deviant areas of society, resulting from the unrestricted ability of grand juries to compel reporter attendance and testimony immediately after publication of stories dealing with these elements of society, is readily apparent. The affidavit of the Petitioner (Appendix, p. 67) demonstrates the immediate onset of this effect following upon the grand jury efforts here.

Clearly, the freedom to publish must necessarily encompass the freedom to have access to and obtain the information to be published.

> The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens. [*Grosjean* v. *American Press Co.*, 297 U. S. 233, 249-250 (1935) (quoting 2 Cooley, Const. Lim., 8th ed., p. 886)].

Thus, this Court has recognized that there are circumstances in which the anonymity of the person speaking must be protected in order to protect his right to speak, and the right of the public to be informed. In certain situations, the Court has determined that a requirement of the state that the speaker be identified would have a "chilling effect" upon that person's right to speak. See, *e. g., Talley* v. *California,* 362 U. S. 60 (1960); *Gibson* v. *Florida Investigation Committee,* 372 U. S. 539 (1963); *cf. National Association for the Advancement of Colored People* v. *Button, supra.* In *Talley, supra,* at 65, the Court emphasized that the reason for the protection of anonymity "was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."

The same situation is presented by a requirement that a reporter must divulge the names of those who confidentially furnished him information for publication relating to matters of public concern, and which

are the subject of vigorous public debate. If the reporter is required to divulge this information, he, as well as all news gatherers, will soon be in the position of being unable to obtain such information, and the public will be deprived of information and the varying points of view necessary to make informed decisions on matters of public concern.

This Court has repeatedly emphasized that where First Amendment rights are involved, only a compelling state interest can justify restrictions on the effective exercise of these rights. *See, e.g. Louisiana ex rel. Gremillion* v. *National Association for the Advancement of Colored People,* 366 U. S. 293 (1961); *Gibson* v. *Florida Investigation Committee, supra; National Assiciation for the Advancement of Colored People* v. *Button, supra.* Only after the state has shown this compelling interest can it then constitutionally engage in activities that restrict the exercise of constitutional rights by private citizens.

Nevertheless, the Commonwealth of Kentucky has made no effort whatsoever to justify its desire to obtain the information in question from Mr. Branzburg. Despite the fact that

> it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest. [*Gibson* v. *Florida Investigation Committee, supra,* at 546.]

the Commonwealth has made no showing that the information was unobtainable by other means or that it was necessary to protect a compelling state interest.

The Kentucky decisions have shifted to the reporter the duty to show he is entitled to the protection of the First Amendment. Such a ruling is a serious infringement on the fundamental rights here involved. This Court has consistently held that where there is an encroachment or limitation upon rights and freedoms guaranteed by the Constitution, the state may prevail only by showing a compelling state interest which subordinates the right or freedom involved. *Bates* v. *Little Rock,* 361 U. S. 516 (1960); *National Association for the Advancement of Colored People* v. *Button, supra.* The burden should be on the state, not the individual.

The question of newsmen's rights under the First Amendment is an issue of current public importance which has not yet been clearly defined by this Court. To allow the present questions to continue unanswered would itself be a severe limitation on freedom of the press.

II

There Is a Conflict of Decision Among the Courts of Appeals and State Court Decision.

The decisions in various jurisdictions in the United States, both federal and state, show that a conflict has developed in regard to the asserted constitutional right of a newsman to refuse to respond to a subpoena to appear before a grand jury, to answer certain questions

posed by a grand jury, or to disclose the names of persons who supplied information for publication upon the condition and confidence that their names would not be revealed.

Upon occasion, in the past, it has been asserted that the First Amendment rights of freedom of speech and freedom of the press are subordinate to, and yield to the right of the state to proceed with its judicial functions. *See, e.g., Garland* v. *Torre,* 259 F. 2d 545 (2nd Cir. 1958), *cert. denied,* 358 U. S. 910 (1958); *State* v. *Buchanan,* 436 P. 2d 729 (Ore.), *cert. denied,* 392 U. S. 905 (1968); *In Re Goodfader's Appeal,* 45 Hawaii 317, 367 P. 2d 472 (1961). Recently, however, the Court of Appeals for the Ninth Circuit has recognized the clear predominance of First Amendment rights over the right of the state to compel Grand Jury attendance, *Caldwell* v. *United States, supra.* This decision recognized the importance of confidential sources to a news gatherer in his attempt to inform the public of all points of view in regard to an issue of public interest.

The Kentucky Court of Appeals in the instant cases has considered the decision in Caldwell, but has rejected its findings in favor of the view that the sources of information of a newspaper reporter and background information developed on a confidential basis are not privileged under the First Amendment.

CONCLUSION

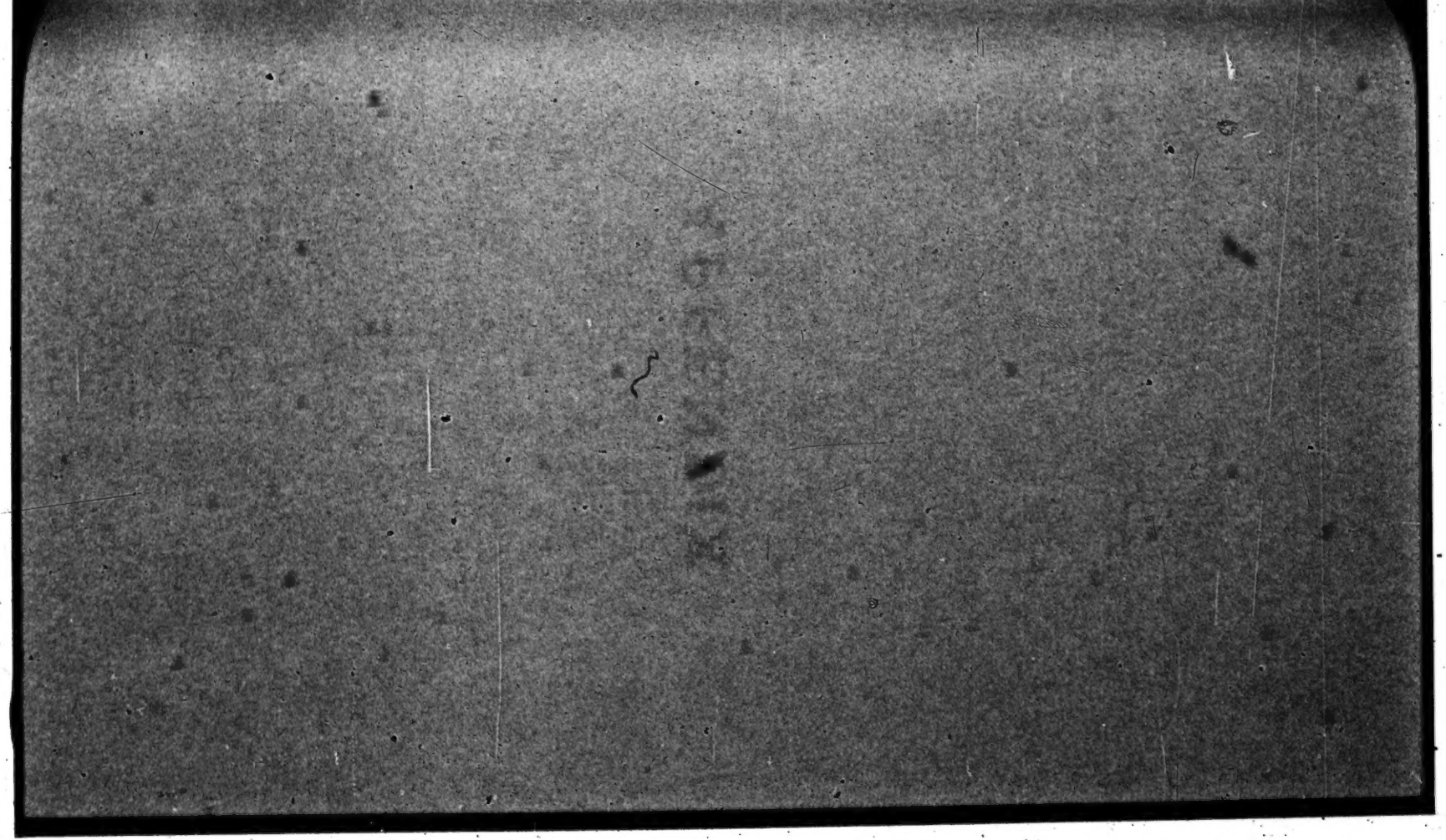
The issue here involved presents special and important reasons to grant a writ of certiorari. This Court has never ruled on the issue, yet it is one most basic to the fundamental rights of freedom of the press and freedom of speech. Where the rights of the public to be informed on controversial issues of the day are threatened by state action, the most compelling reasons for review are presented. In this case the applicable law has not been clearly defined and definition is absolutely necessary to the function of the Petitioner, and others like him, as news reporters. The Kentucky Court of Appeals has specifically denied recognition of the rights asserted here and has disputed the logic and theory of the Ninth Circuit in *Caldwell, supra.* The lack of precise authority in the lower courts, because of the conflicts of decisions, adds to the confusion.

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Kentucky Court of Appeals.

Respectfully submitted,

EDGAR A. ZINGMAN,
ROBERT C. EWALD,
JON L. FLEISCHAKER,
WYATT, GRAFTON & SLOSS,
300 Marion E. Taylor Building,
Louisville, Kentucky 40202,

Counsel for Petitioner.



KENTUCKY REVISED STATUTES

421.100 [1649d-1] Newspaper, radio or television broadcasting station personnel need not disclose source of information.

No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected. (1952 c 121. Eff. 6-19-52.)

KENTUCKY RULES OF CRIMINAL PROCEDURE

5.02 Charge to grand jury.

The court shall swear the grand jurors and charge them to inquire into every offense for which any person has been held to answer and for which an indictment or information has not been filed, or other offenses which come to their attention or of which any of them has knowledge. The court shall further instruct the grand jurors concerning inspections and reports which are required of them by law.

5.06 Attendance of witnesses.

The circuit clerk, upon request of the foreman of the grand jury, or of the attorney for the Commonwealth, made during a term of court or in vacation, shall issue subpoenas for witnesses. The attendance of witnesses may be coerced as in other judicial proceedings.

5.12 Compelling testimony.

When a witness before the grand jury refuses to testify or to answer a question put to him, the foreman shall state the refusal to the court in the presence of the witness. After hearing the witness, if the court decides that he is bound to testify or answer and he persists in his refusal, the court shall proceed against the witness as in cases of similar refusal in open court.

The Courier-Journal, Louisville, Ky.—Saturday Morning, November 15, 1969

Could Be a Pot of Gold

THE HASH THEY MAKE ISN'T TO EAT

By Paul M. Branzburg
Courier-Journal Staff Writer

Larry, a young Louisville hippie, wiped the sweat off his brow, looked about the stuffy little room and put another pot on a stove over which he had been laboring for hours.

For over a week, he has been proudly tending his pots and pans. But he also has paused frequently to peek out the door in search of "The Man" (police).

Larry and his partner, Jack, are engaged in a weird business that is a combination of capitalism, chemistry and criminality.

They are operating a makeshift laboratory in south-

Pictures on Page B1.

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central Louisville that may produce them enough hashish, or "hash", a concentrate of marijuana, to net them up to $5,000 for three weeks of work.

Larry and Jack were once run-of-the-mill dope dealers, but in the past few months they have expanded operations and become dope manufacturers.

On a sunny afternoon last week, Larry entered his "lab" and began another day of cooking hash. With long-handled pruning shears, he began chopping marijuana stems into a large tub.

"I don't know why I'm letting you do this story," he said quietly. "To make the narcs (narcotics detectives) mad, I guess. That's the main reason." However, Larry and his partner asked for and received a promise that their names would be changed.

The room had once been a kitchen, but it now smelled like a stable. A bare lightbulb on the ceiling cast a pallid glow over the cracked pink walls, an old-fashion gas stove, a green mattress on the floor and a pile of cheap broken furniture in the corner. A filthy sink was stacked with dirty dishes. The floor was covered with discarded marijuana that had already been processed.

'Partly an Ego Trip'

"The trouble we're having is finding the right base," Larry said, as he continued to chop stems. "The hash we've produced gets you stoned, but it doesn't smoke the same way as foreign hash. I tried to use incense as a base, but it gives too much of a sweet taste. In the Middle East they use camel manure, so I'm thinking of going out to the zoo and copping some camel manure."

"For me, making hash is partly an ego trip," he said. "To see how good I can make it. To see how close I can get it to foreign hash. We've gotten it to the right consistency, but not the right taste."

Larry is a tall, slender 21-year-old who has traveled over much of the world and whose parents live in a very comfortable home in the East End. He has been on Louisville's hip scene for about a year.

Jack is a long-haried 20-year-old who has been in Louisville two years. "I came down here when I was 18," he says, "and my sister was turning on, and so I slowly met the hip people."

Have 30 Pounds

Both deny they are manufacturing hash for the money, although they admit that it can be fantastically profitable.

Hashish is most commonly sold at about $7 to $10 per gram, and there are about 29 grams per ounce. Larry and Jack have about 30 pounds of marijuana—originally picked in Kentland, Ind.—and that is enough to yield about five pounds of hashish.

When sold in bulk, hashish brings $800 to $1,000 per pound. Larry and Jack already have five buyers who want a pound apiece. So they should make $4,000 to $5,000 for three weeks of work.

At first glance, it appears that Larry and Jack make a great deal of money. Actually, if they are successful in manufacturing and selling five pounds of hashish, they will probably go out of business for a few months. They have only bothered to make hashish three times this year.

"If you have no status to live up to, you don't worry when you run out of bread (money)," says Jack. "It's nice to work and have nice things, but its too much of a hassle."

Larry poured rubbing alcohol into the tub of marijuana stems and put it on the stove to cook. Soon the room was full of the sick smell of gaseous alcohol. Larry opened the window and sat down on the mattress to avoid the fumes.

"Actually, this is a service to keep people away from heroin," he said, seriously. "Junk is like being dead. You can't eat, sleep or have sex. But hash is enlightening."

The dope duo have divided up business responsibilities. Larry manufactures. Jack is "vice president in charge of sales—or something like that."

JEFFERSON CIRCUIT COURT

CRIMINAL BRANCH, SECOND DIVISION
COMMONWEALTH OF KENTUCKY, COUNTY OF JEFFERSON

In Re: No. 141087

ORDER

At a Court Held November 25, 1969.

This case being before the November Term of the Grand Jury, comes Edwin A. Schroering, Jr., Commonwealth's Attorney, and requests the Court to rule whether the witness, Paul Branzburg, should be held in contempt of Court, under Rule 5.12, for failing to answer two questions propounded to him by the Grand Jury. Comes the Foreman of the Grand Jury, Mr. E. H. Speckman, Jr., and reads the questions, to-wit:

#1. On November 12, or 13, 1969, who was the person or persons you observed in possession of Marijuana, about which you wrote an article in the Courier-Journal on November 15, 1969?

#2. On November 12, or 13, 1969, who was the person or persons you observed compounding Marijuana, producing same to a compound known as Hashish?

Argument of the Commonwealth and the witness, Paul Branzburg by counsel, Mr. Edgar A. Zingman heard. Mr. Zingman argued that Rule 421.100 applies in this case and that the witness, Paul Branzburg, should not be required to answer the questions. The Commonwealth's argument that Rule 421.100 does not apply in this case heard. The Commonwealth requests that the Court direct the witness,

Paul Branzburg, to answer the questions propounded to him by the Grand Jury. The Court being sufficiently advised, holds that the witness shall answer. Ordered that this case be and is assigned to 9:30 A.M. Wednesday, November 26, 1969. Counsel, Mr. Zingman, enters his objection on the grounds pursuant to Rule 421.100 and the freedom of the Press under the First Amendment to the Constitution of the United States of America.

(s) J. Miles Pound,
Judge

IN THE

COURT OF APPEALS OF KENTUCKY

Original No. _____

Paul Branzburg - - - - - - - - - Petitioner

v.

J. Miles Pound, Judge, Jefferson Circuit Court, Criminal Branch, Second Division, Jefferson County Courthouse, Louisville, Kentucky - Respondent

PETITION FOR TEMPORARY AND PERMANENT RESTRAINING ORDER AND WRIT OF MANDAMUS

Comes now Paul Branzburg, by counsel, pursuant to R.C.A. 1.420 and C.R. 81, and for his petition states as follows:

(1) The Respondent against whom relief is sought is the Honorable J. Miles Pound, Judge, Jefferson Circuit Court, Criminal Division, Jefferson County Courthouse, Louisville, Kentucky.

(2) The facts entitling Petitioner to relief are:

(a) Petitioner is an individual employed by the Courier-Journal & Louisville Times Company, a Kentucky corporation.

(b) Petitioner's duties as a reporter require Petitioner to seek out and contract sources of news information, to then write stories based upon the facts he has observed and to have such stories published in the newspapers published by his employer in Jefferson County, Kentucky for distribution and sale in Jefferson County, Kntucky, throughout

the Commonwealth of Kentucky and in various places in the United States.

(c) In the November 15, 1969 issue of the Courier-Journal, there appeared a story written by Petitioner based upon information which he had acquired on or about November 12 or 13, 1969. A copy of the story is attached hereto and made a part of this petition.

(d) On November 25, 1969, the Petitioner was called before a grand jury sitting in Jefferson County, Kentucky and was examined concerning the events and matters set forth in the story attached hereto. During the course of that examination Petitioner was asked the following questions:

1. On November 12 and 13, 1969, who was the person or persons you observed in possession of marijuana of which you wrote an article in the Courier-Journal of November 15, 1969?

2. On November 12 and 13, 1969, who was the person or persons you observed in compounding and mixing marijuana reducing same to a compound known as hashish of which you wrote an article in the Courier-Journal of November 15, 1969?

(e) The Petitioner refused to answer each of said questions on the grounds of the privilege not to answer afforded to him by KRS 421.100 which provides as follows:

> 421.100 (1649d-1) Newspaper, radio or television broadcasting station personnel need not disclose source of information.
>
> No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any com-

mittee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.

(f) Following upon this claim of privilege the Petitioner, the foreman of the grand jury and the Commonwealth's attorney appeared before the Respondent. The matter was presented to the Respondent. The undersigned counsel for the Petitioner advised the Respondent that the Petitioner was entitled not to answer the quetsions under the provisions of KRS 421.100 and under the provisions of the First and Fourteenth Amendments to the Constitution of the United States and Sections 1, 2 and 8 of the Constitution of the Commonwealth of Kentucky.

(g) After hearing counsel, the Respondent directed that the Petitioner should appear again before the grand jury and that the questions should again be put to the Petitioner. He further announced that in the event that the grand jury shall report back to Respondent that the Petitioner had again refused to answer the questions, that Respondent would then pursue the provisions provided for dealing with contempts of court.

(h) The Respondent set 9:30 A.M., Wednesday, November 26, 1969, as the time for further proceedings in this matter.

(i) Following upon the announcement of the ruling of the Court the Petitioner again appeared before the grand jury and upon being posed the same questions again asserted his privilege against answering said questions and refused to answer said questions.

(3) The contempt action which will be against the Petitioner on November 26, 1969, is clearly violative of his rights and privileges as provided under KRS 421.100 and under Sections 1, 2 and 8 of the Constitution of the Com-

monwealth of Kentucky and the First and Fourteenth Amendments of the Constitution of the United States of America. It is an interference with the exercise of freedom of the press and would permit courts to destroy that confidential relationship which is essential to a free press and which has been provided for by the Legislature of the Commonwealth of Kentucky.

(4) The nature of the relief sought:

(The Petitioner, by counsel, respectfully prays that a writ issue from this Court requiring that:

(a) The Respondent, the Honorable J. Miles Pound, Judge, Jefferson Circuit Court, Criminal Division, Jefferson County Courthouse, Louisville, Kentucky, be restrained from proceeding against the Petitioner on November 26, 1969 or thereafter in the matter of contempt proceedings growing out of the exercise by the Petitioner under his privilege under KRS 421.100 and the Constitutions of the Commonwealth of Kentucky and of the United States of America.

(b) That the entire matter be set down for hearing at a time to be set by this Court for determination upon a permanent writ against the Respondent.

(c) All other necessary and proper relief to which the Petitioner shall appear entitled.

Respectfully submitted,

Wyatt, Grafton & Sloss
300 Marion E. Taylor Building
Louisville, Kentucky 40202

(s) Edgar A. Zingman
(s) Robert C. Ewald
Counsel for Petitioner

The affiant, Paul Branzburg, states that he has read the foregoing petition, and that the statements contained therein are true as he verily believes.

(s) Paul M. Branzburg

IN THE

COURT OF APPEALS OF KENTUCKY

F-213-69

Paul Branzburg - - - - - - - Petitioner

v.

J. Miles Pound, Judge,
Jefferson Circuit Court,
Criminal Branch, Second
Division, Jefferson County
Courthouse, Louisville, Kentucky - - Respondent

To: J. Miles Pound, Judge
Jefferson Circuit Court,
Criminal Branch, Second
Division, Jefferson County
Courthouse, Louisville, Kentucky

ORDER

This cause coming on to be heard on the petition of Paul Branzburg for an order prohibiting further proceedings by the respondent in the matter of the contempt of the aforesaid Paul Branzburg for refusing to answer questions posed to him by a grand jury sitting this date in Jefferson County, Kentucky, concerning a certain news story written by the aforesaid Paul Branzburg and published in the Courier-Journal in Louisville, Kentucky, on November 15, 1969, and the court being sufficiently advised, it is ordered,

That you be temporarily prohibited from further action in the above-entitled matter until your response has

been made and this court has had an opportunity to consider the question presented on its merits.

Heard before Judges Reed, Osborne and Milliken.

Entered this November 25, 1969.

Attested: November 25, 1969.

(SEAL)

OPINION OF THE COURT BY COMMISSIONER VANCE

DISMISSING PETITION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS

The petitioner, Paul Branzburg, a staff writer for the Louisville Courier Journal, produced an illustrated story entitled "The Hash They Make Isn't to Eat" which was published in the Courier Journal on November 15, 1969 and revealed how a copious quantity of marijuana was converted into the more potent drug hashish for which a locally profitable and ready market impliedly existed. The story was based upon information acquired by the writer's observation during an interview granted to him upon a pledge that the identity of the two producers of hashish would not be revealed.

When summoned to appear before the Jefferson County Grand Jury ten days later, Branzburg refused to disclose the identity of the men, was held in contempt for his refusal, and we stayed enforcement of the contempt order until the intrinsically important legal issues presented could be given more consideration.

Marijuana (cannabis) is defined as a narcotic drug by statute, KRS 218.010(14), and unlicensed possession or compounding of such drugs is a felony punishable by both fine and imprisonment. KRS 218.210. Therefore Branzburg saw the commission of the statutory felonies of un-

lawful possession of marijuana and the unlawful conversion of it into hashish.

KRS 421.100 provides:

> "No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected."

The petitioner concedes in his argument before this court that the general weight of authority is that there is no constitutional guarantee of the privilege he seeks (see Judy Garland v. Marie Torre, 259 F. 2d 545, Second Circuit, Certiorari Denied, 79 S. Ct. 237 (1958)), and petitioner submits that the only question of any information as the meaning of the words source of any information as used in KRS 421.100.

On behalf of the respondent, it is urged that source of information refers to an informant and that the statute was enacted to allow and to encourage a person having knowledge of matters which should be called to public attention to make those matters known without revealing his identity and without subjecting himself to the possibility of vengeance, retribution or public embarrassment which might be brought upon him by a revelation of his identity.

The petitioner, on the other hand, contends that source of information should be construed to mean all knowledge received by a newsman no matter what the source. He

argues, in effect, that when a newsman observes something, the thing observed is itself the source of the information.

At the outset we observe that at common law no privilege existed in favor of communications made to newsmen. In re Goodfader, Hawaii, 367 P. 2d 472 (1961); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (1957); 58 Am. Jur., Witnesses, Section 546; 97 C.J.S., Witnesses, Section 259, See Annotation 7, ALR 3rd 59.

KRS 421.100 which grants a newsman the privilege against disclosing his source of information is therefore a statute in derogation of the common law. The rule that statutes in derogation of the common law should be strictly construed does not apply in Kentucky. KRS 446.080. Nevertheless some limitations by way of statutory construction have been placed upon statutes relating to privileged communications and it is elementary that a privilege which did not exist at common law cannot be asserted under a statute unless it is clear that the statute was intended to grant the privilege.

In construing KRS 421.210(4) relating to privileged communications to attorneys, the identity of one employing an attorney to return stolen merchandise was held not privileged because such employment of an attorney was not in his professional capacity. Hughes v. Meade, Ky., 453 S. W. 2d 538 (1970). Communication made to an attorney in his professional capacity was nevertheless denied privilege when the person making the communication subsequently employed another attorney and sought to maintain a fraudulent action which would have been defeated by the disclosure of the alleged privileged communication. Fidelity-Phenix Fire Ins. Co. of New York v. Hamilton, Ky., 340 S. W. 2d 218 (1960). Communications to an attorney of an intention to commit future crimes or frauds are not entitled to privilege under the statute. Cummings v. Com-

monwealth, 221 Ky. 301, 298 S. W. 943 (1927) and Standard Fire Ins. Co. v. Smithhart, 183 Ky. 679, 211 S. W. 441 (1919), 5 ALR 972.

It is the opinion of this court that the language of KRS 421.100 granting immunity to a newsman from disclosing the source of any information procured or obtained by him, grants a privilege from disclosing the source of the information but does not grant a privilege against disclosing the information itself.

Information as used in the statute refers to the things or the matters which a reporter leans and source refers to the method by which or to the person from whom he learns them.

In this case the reporter learned that two men were engaged in the process of making hashish. Their identity, as well as the activity in which they were engaged, was a part of the information obtained by him, but their identity was not the source of the information.

The actual source of the information in this case was the reporter's personal observation. In addition some informant may have provided him with information that at a certain time and place he could observe the process of conversion of marijuana into hashish. If such was the case we have no doubt that the identity of the informant was protected by the statute.

The reporter, however, was not asked to reveal the identity of any such informant and his privilege from making that disclosure is not in question. He was asked to disclose the identity of persons seen by him in the perpetration of a crime and he refused, urging as a justification for such refusal, that the statute should be given a broad construction extending his privilege against disclosure to all his knowledge of this incident rather than just the source of the knowledge.

The harm which ultimately might result to society from letting the reporter maintain his silence as to the identity of those seen by him in the commission of the crime in the instant case might not be earthshaking but we must consider where such a course could lead us.

Supose a newsman or reporter should see the President of the United States or the Governor of the Commonwealth assassinated upon the street; or see a bank robbery in progress; or see a forcible rape committed. Under the construction of the statute sought by the petitioner, such a reporter could not be compelled to identify the perpetrator of the crime. We do not think the legislature ever intended such a result.

Support for the proposition that no such carte blanche privilege was intended is found in the limiting language of the statute requiring a publication of the information before any privilege attaches against disclosure of the source thereof.

In all likelihood the present case is complicated by the fact that the persons who committed the crime were probably the same persons who informed Branzburg that the crime would be, or was being, committed. If so, this is a rare case where informants actually informed against themselves. But in that event the privilege which would have protected disclosure of their identity as informants cannot be extended beyond their role as informants to protect their identity in the entirely different role as perpetrators of a crime.

For the reasons herein given we feel that KRS 421.100 does not extend to the petitioner a privilege to refuse to answer the specific questions asked of him by the Jefferson County Grand Jury. The petition for writ of prohibition and writ of mandamus is hereby dismissed.

Milliken, Palmore, Osborne, Steinfeld and Reed concur.
Neikirk, J., not sitting.
Dissenting opinion by Hill, C. J.

Attorneys for Petitioner:

EDGAR A. ZINGMAN & ROBERT C. EWALD,
WYATT, GRAFTON & SLOSS,
300 Marion E. Taylor Building,
Louisville, Kentucky 40202.

Attorneys for Respondent:

EDWIN A. SCHROERING,
Commonwealth's Attorney,
Courthouse,
Louisville, Kentucky 40202,

CARL C. OUSLEY, JR.,
First Assistant Commonwealth's Attorney,
Courthouse,
Louisville, Kentucky 40202.

DISSENTING OPINION BY CHIEF JUSTICE EDWARD P. HILL, JR.

I respectfully dissent from the majority's opinion interpreting an act of the Legislature (KRS 421.100) that has been the law of our Commonwealth for more than thirty-four years without being heretofore questioned in the courts.

I shall not attempt to reiterate in this dissent the facts of the case but shall go right to the heart of the question. The majority opinion to my mind has adopted a strained and unnecessarily narrow construction of the term "source of any information procured or obtained" used in KRS 421.100. I believe that the phrase "source of any information" is a broad, comprehensive one, certainly not a technical phrase.

The majority opinion stands for the proposition that the statute in question does not apply in instances in which a newspaper reported witnesses the commisison of a crime. But the statute does not place any such limitation on the privilege. It certainly would have been no trouble for the Legislature to have provided for an exception to the privilege had it thought one advisable. The statue in question is the expression of public policy by the proper branch of government, the Legislature, after nearly 150 years' experience, and this court has no business interfering with great and fundamental policy questions of our system of government.

It must be remembered that the present case does not involve injury to life, limb, or property. But even if it did, we have a situation requiring the balance of values, and I believe, as apparently did the Legislature, that the benefits to society from thoroughly and correctly reporting current events greater outweighs the probable and highly imaginary possibility of their abuse under the statute. Who ever

heard of a man about to commit a crime against life, limb, or property either calling in a newspaper reporter or soliciting a newspaper reporter to witness the crime upon being assured that the reporter would not disclose what he was about to observe? Actually, the privilege provided in the statute is one which the newspaper people may weigh, and I have greater confidence in the newspaper world than to think it would participate in such an imaginary scheme or refuse to divulge important information obtained under such circumstances.

I recognize that the authorities in this country are not uniform with respect to whether newspapers have the privilege safeguarded by our statute and guaranteed by the First Amendment to the Constitution of the United States. See 47 Oregon L. Rev. 243 (1968), and 82 Harv. L. Rev. 1384 (1969). However, I am unable to find any authority from any state refusing to give such privilege a broad interpretation when a statute has been enacted by the legislature of such state safeguarding that privilege.

For an excellent summary of various newspapermen immunity statutes see D'Alemberte, "Journalists Under the Ax: Protection of Confidential Sources of Information," 6 Harv. J. Legis 307 (1969).

I conclude this dissent by quoting Re Robert L. Taylor, 412 Pa. 32, 193 A 2d 181, 185, 7 ALR 3d 580, 587 (1963):

> "It is a matter of widespread common and therefore of Judicial knowledge that newspapers and news media are the principal source of news concerning daily local, State, National and international events. We would be unrealistic if we did not take judicial notice of another matter of wide public knowledge and great importance, namely, that important information, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public

duty, bribery, corruption, conspiracy and other crimes committed or possibly committed by public officials or by powerful individuals or organizations, unless newsmen are able to fully and completely protect the sources of their information. It is vitally important that this public shield against governmental inefficiency, corruption and crime be preserved against piercing and erosion.

* * * * *

"The Act of 1937 is a wise and salutary declaration of public policy whose spiritual father is the revered Constitutionally ordained freedom of the press. The Act must therefore, we repeat, be liberally and broadly construed in order to carry out the clear objective and intent of the Legislature which has placed the gathering and the protection of the sources of news as of greater importance to the public interest and of more value to the public welfare than the disclosure of the alleged crime or the alleged criminal."

I would issue the writ of prohibition sought herein.

Attorneys for Petitioner:

EDGAR A. ZINGMAN,
ROBERT C. EWALD,
WYATT, GRAFTON & SLOSS,
300 Marion E. Taylor Building,
Louisville, Kentucky 40202.

Attorneys for Respondent:

EDWIN A. SCHROERING,
Commonwealth's Attorney,
Courthouse,
Louisville, Kentucky 40202,

CARL C. OUSLEY, JR.,
First Assistant Commonwealth's Attorney,
Courthouse,
Louisville, Kentucky 40202.

MOTION TO RECONSIDER

The petitioner, Paul Branzburg, by counsel, moves the Court to reconsider its decision and order rendered November 27, 1970, based on the Memorandum attached hereto and the decision of the United States Court of Appeals for the Ninth Circuit in Caldwell v. United States, No. 26,025 (November 16, 1970); a copy of which is filed with this motion.

Wyatt, Grafton & Sloss
300 Marion E. Taylor Bldg.
Louisville, Kentucky 40202
Counsel for Petitioner

(s) Edgar A. Zingman
(s) Robert C. Ewald

OPINION OF THE COURT BY COMMISSIONER VANCE DISMISSING PETITION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS

The petitioner, Paul Branzburg, a staff writer for the Louisville Courier-Journal, produced an illustrated story entitled "The Hash They Make Isn't to Eat" which was published in the Courier-Journal on November 15, 1969, and revealed how a copious quantity of marijuana was converted into the more potent drug hashish for which a locally profitable and ready market impliedly existed. The story was based upon information acquired by the writer's observation during an interview granted to him upon a pledge that the identity of the two producers of hashish would not be revealed.

When summoned to appear before the Jefferson County Grand Jury ten days later, Branzburg refused to disclose the identity of the men. He was ordered to reappear before the grand jury and threatened with contempt pen-

alties if he persisted in his refusalto answer the questions propounded. We stayed further proceedings until the intrinsically important legal issues presented could be given more consideration.

Marijuana (cannabis) is defined as a narcotic drug by statute, KRS 218.010(14), and unlicensed possession or compounding of such drugs is a felony punishable by both fine and imprisonment. KRS 218.210. Therefore Branzburg saw the commission of the statutory felonies of unlawful possession of marijuana and the unlawful conversion of it into hashish.

KRS 421.100 provides:

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The petitioner concedes in his argument before this court that the general weight of authority is that there is no constitutional guarantee of the privilege he seeks (see Judy Garland v. Marie Torre, 259 F. 2d 545, Second Circuit, Certiorari Denied, 79 S. Ct. 237 (1958), and petitioner submits that the only question before this court is the meaning of the words source of any information as used in KRS 421.100.[1]

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[1]Petitioner raised the question of constitutional privilege and conceded that the weight of authority was that no such constitutional privilege existed in the following language:

(Footnote continued on following page.)

On behalf of the respondent, it is urged that source of information refers to an informant and that the statute was enacted to allow and to encourage a person having knowledge of matters which should be called to public attention to make those matters known without revealing his identity and without subjecting himself to the possibility of vengeance, retribution or public embarrassment which might be brought upon him by a revelation of his identity.

The petitioner, on the other hand, contends that source of information should be construed to mean all knowledge received by a newsman no matter what the source. He argues, in effect, that when a newsman observes something, the thing observed is itself the source of the information.

At the outset we observed that at common law no privilege existed in favor of communications made to newsmen. In re Goodfader, Hawaii, 367 P. 2d 472 (1961); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (1957); 58 Am. Jur., Witnesses, Section 546; 97 C.J.S., Witnesses Section 259, See Annotation 7, ALR 3rd 591.

KRS 421.100 which grants a newsman the privilege against disclosing his source of information is therefore a

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"Although the general weight of authority seems to hold that there is no constitutional guarantee to such a privilege, there does seem to be a minority viewpoint that there is such a privilege existing under the first amendment." (Petitioner's supplemental memorandum—page 2.)

Petitioner then abandoned the claim of first amendment privilege, as follows:

"Thus, the controversy continues as to whether a newsman's source of information should be privileged. However, that question is not before the Court in this case. The Legislature of Kentucky has settled the issue, having decided that a newsman's source of information is to be privileged. Because of this there is no point in citing Professor Wigmore and other authorities who speak against the grant of such a privilege. The question has been many times debated, and the Legislature has spoken. The only question before the Court is the construction of the term 'cource of information' as it was intended by the Legislature." (Petitioner supplemental memorandum—page 4.)

Accordingly, this opinion limits itself to the construction of the statute.

statute in derogation of the common law. The rule that statutes in derogation of the common law should be strictly construed does not apply in Kentucky. KRS 446.080. Nevertheless some limitations by way of statutory construction have been placed upon statutes relating to privileged communications and it is elementary that a privilege which did not exist at common law cannot be asserted under a staute unless it is clear that the statute was intended to grant the privilege.

In construing KRS 421.210(4) relating to privileged communications to attorneys, the identity of one employing an attorney to return stolen merchandise was held not privileged because such employment of an attorney was not in his professional capacity. Hughes v. Meade, Ky., 453 S. W. 2d 538 (1970). Communication made to an attorney in his professional capacity was nevertheless denied privilege when the person making the communication subsequently employed another attorney and sought to maintain a fraudulent action which would have been defeated by the disclosure of the alleged privileged communication. Fidelity-Phenix Fire Ins. Co. of New York v. Hamilton, Ky., 340 S. W. 2d 218 (1960). Communications to an attorney of an intention to commit future crimes or frauds are not entitled to privilege under the statute. Cummings v. Commonwealth, 221 Ky. 301, 298 S. W. 943 (1927) and Standard Fire Ins. Co. v. Smithhart, 183 Ky. 679, 211 S. W. 441 (1919), 5 ALR 972.

It is the opinion of this court that the language of KRS 421.100 granting immunity to a newsman from disclosing the source of any information procured or obtained by him, grants a privilege from disclosing the source of the information but does not grant a privilege against disclosing the information itself.

Information as used in the statute refers to the things or the matters which a reporter learns and source refers to

the method by which or to the person from whom he learns them.

In this case the reporter learned that two men were engaged in the process of making hashish. Their identity, as well as the activity in which they were engaged, was a part of the information obtained by him, but their identity was not the source of the information.

The actual source of the information in this case was the reporter's personal observation. In addition some informant may have provided him with information that at a certain time and place he could observe the process of conversion of marijuana into hashish. If such was the case we have no doubt that the identity of the informant was protected by the statute.

The reporter, however, was not asked to reveal the identity of any such informant and his privilege from making that disclosure is not in question. He was asked to disclose the identity of persons seen by him in the perpetration of a crime and he refused, urging as a justification for such refusal, that the statute should be given a broad construction extending his privilege against disclosure to all his knowledge of this incident rather than just the source of the knowledge.

The harm which ultimately might result to society from letting the reporter maintain his silence as to the identity of those seen by him in the commission of the crime in the instant case might not be earthshaking but we must consider where such a course could lead us.

Suppose a newsman or reporter should see the President of the United States or the Governor of the Commonwealth assassinated upon the street; or see a bank robbery in progress; or see a forcible rape committed. Under the construction of the statute sought by the petitioner, such a reporter could not be compelled to identify the perpetrator of the crime. We do not think the legislature ever intended such a result.

Support for the proposition that no such carte blanche privilege was intended is found in the limiting language of the statute requiring a publication of the information before any privilege attaches against disclosure of the source thereof.

In all likelihood the present case is complicated by the fact that the persons who committed the crime were probably the same persons who informed Branzburg that the crime would be, or was being, committed. If so, this is a rare case where informants actually informed against themselves. But in that event the privilege which would have protected disclosure of their identity as informants cannot be extended beyond their role as informants to protect their identity in the entirely different role as perpetrators of a crime.

For the reasons herein given we feel that KRS 421.100 does not extend to the petitioner a privilege to refuse to answer the specific questions asked of him by the Jefferson County Grand Jury. The petition for writ of prohibition and writ of mandamus is hereby dismissed.

Milliken, Palmore, Osborne, Steinfeld and Reed concur.

Neikirk, J., not sitting.

Dissenting opinion by Hill, C. J.

Attorneys for Petitioner:

EDGAR A. ZINGMAN & ROBERT C. EWALD,
WYATT, GRAFTON & SLOSS,
300 Marion E. Taylor Building,
Louisville, Kentucky 40202.

Attorneys for Respondent:

EDWIN A. SCHROERING,
Commonwealth's Attorney,
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Louisville, Kentucky 40202,

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First Assistant Commonwealth's Attorney,
Courthouse,
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MANDATE

THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals
Fall Term—November 27, 1970

Paul Branzburg

v.

J. Miles Pound, Judge, Jefferson Circuit Court, Criminal Branch—2nd Div., Louisville, Kentucky

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Appeal from a judgment of the
In Court of Appeals Circuit Court

The Court being sufficiently advised, delivered an opinion dismissing petition for writ of prohibition and writ of mandamus.

It is therefore considered that said petition be dismissed; which is ordered to be certified.

It is further considered that the appellee recover of the appellant his cost herein expended.

A copy—Attest:

Dick Vermillion, C.C.A.
By (s) John C. Scott, D. C.

Issued January 22, 1971

The Courier-Journal & Times, Louisville, Ky.—Sunday Morning, January 10, 1971

ROPE TURNS TO POT

Once An Industry, Kentucky Hemp Has Become a Drug Problem.

By Paul M. Branzburg
Courier-Journal Staff Writer

Frankfort, Ky.—On a lonely stretch of road on the outskirts of this city, there is an historical marker entitled "Franklin County Hemp." It tells passing motorists that hemp was once Kentucky's largest cash crop, that the gloomy buildings nearby were "the last hemp factory to operate in Kentucky, closing down in 1952."

However, the history of Franklin County hemp did not come to an end in 1952.

It is true that the stalk of Kentucky hemp is no longer used to make rope for the rigging of American sailing vessels, to make bags to hold the South's cotton. But a growing number of youths in and around Kentucky's capital city are now harvesting the plant and smoking the leaves.

The leaves are known as marijuana.

Unlawful drug use has come to the small cities of the commonwealth.

Indeed, Gov. Louie B. Nunn noted at his drug information conference, held five weeks ago in Louisville, that illegal drug use may be growing faster in small towns and rural areas than in major cities.

Based on area interviews

To find out more about this phenomenon, a reporter selected Frankfort—with a population of about 23,500—and spent two weeks interviewing several dozen drug users in the capital city. He also saw a number of them smoking marijuana.

Based on those interviews and observations, here's a look at the drug scene in Frankfort:

Within the last two years, the use of pot has become commonplace among a minority of Frankfort youth. An even smaller number are using hallucinogenic drugs (such as LSD and mescaline), amphetamines (stimulant drugs known popularly as "pep pills" or "diet pills") and barbiturates (depressant drugs commonly called "sleeping pills").

Heroin is beginning to trickle into Frankfort, although apparently few or none have become addicted.

As elsewhere in Kentucky and the nation, illegal drug use knows no age, class or racial boundaries.

Most users are in their teens and 20s, but this writer spoke to Frankfort pot smokers as young as 4 and as old as 40-plus.

The "typical" unlawful drug user in Frankfort is a middle-class high school or college student, but interviewed marijuana smokers included:

√A middle-level state government official who sold $300 worth of pot last summer and has tried LSD.

√A young Frankfort professional.

√A well-known and highly respected Frankfort resident who recently arranged a marijuana purchase within the capitol building.

√Two state government employes with jobs involving planning and testing.

"I think it's more of a problem than the average citizen thinks," Frankfort Police Chief Douglas L. True, said. "But I don't think Frankfort stands out above all the rest of the cities. It's a problem, not only in Frankfort, but elsewhere."

Illegal drug use in Frankfort is far more limited than in other cities—Louisville and Lexington, for example—and there is nothing to justify hysteria.

Specifically, on the basis of interviews with Frankfort drug users, here is a conservative estimate of the scope of this city's illegal drug activity:

At Franklin County High School, with a student population of 1,622, there are 50 to 100 students who smoke marijuana at least once a month. About another 100 students have tried pot but do not use it regularly.

Of the 50 to 100 who do, 10 to 20 students use amphetamines and barbiturates when available, and about 10 use LSD when they can get it. At least two students have injected heroin at least once.

"I'm surprised," said Robert W. Hoagland, the principal, when told of these estimates. "I would have said 25 to 50 either have used or are using drugs. But that's just a guess."

Recently John Lykins, basketball coach at Franklin County High School, distributed drug use questionnaires to students. No fewer than 157 admitted anonymously that they had "tried drugs."

Hoagland and Lykins say the reliability of the survey is in doubt because some students did not take it seriously, but Lykins estimates that "80 per cent to 90 per cent of the students were telling the truth."

"We don't think that the survey is good public relations for our school," says Lykins. "We don't want parents to think that students are using drugs left and right at Franklin County High—because it isn't so."

At Frankfort City High School, with a student body of 418, probably no more than 25 students smoke pot with any regularity. And just a handful use more potent drugs.

In a recent school-sponsored survey of students at the city high school, 57 students said they had tried pot, 83 thought it should be legalized, 23 said they had used harder drugs than pot, and 139 said they knew where to buy illegal drugs if they wanted them.

"If there are drugs in the community, there will be drugs in the school," says O. C. Leathers, Jr., the principal. "But, outwardly, I haven't been able to see any sign of it—we haven't had any discipline problems or stealing to get money."

At Kentucky State College about 90 of the 900 boarding students smoke pot regularly, according to the more conservative estimates of KSC marijuana users. And at least 300 others have tried it in the past. There is almost no amphetamine or barbiturate use among the boarding students, but about 10 will sniff heroin or cocaine when those drugs are available. A handful use mescaline and LSD, when available.

Small community of users

"If somebody came by with 50 caps (capsules) of 'dugee' (heroin), man, it would be gone in two days," said a student who is fond of "tooting" (sniffing) heroin.

"Dugee"—pronounced DOO-gee—and "tooting" are Negro jargon. The corresponding lingo among white users is "smack" and "snorting.")

Frankfort also has a small community of about 30 who use drugs.

It includes "hip" people several years out of high school, a few commuting Kentucky State students, a few high school students, a few professionals (with short hair), and so on. Marijuana is the primary drug of this group, but a few use amphetamines regularly.

Although Franklin County has several hundred illegal drug users, it would be hard to characterize the situation as a "critical drug problem." This is partly because of the self-restraint and conservatism of the users themselves.

Most users limit themselves to marijuana. The typical Frankfort user is an occasional user, confining his drug intake to weekends. Nearly all avoid the use of hypodermic needles.

'Should be . . . secondary'

And even those who use amphetamines and barbiturates give every evidence of going through an "experimentation stage" in which they are eager to experience all types of drugs.

"I feel drugs should be a secondary thing," a Frankfort High student said. "The trouble with some kids is that they make it a primary thing."

Those in Frankfort most likely to make it "a primary thing" are the high school students. Some of them talk of little else but drugs. Some boast of totally foolhardy consumption of drugs. A few are just plain reckless.

"I was doing speed (amphetamine) one night and finally I just wanted to stop speeding," a 15-year-old Franklin County High student recalled. "So I took a yellowjacket (Nembutal, a barbiturate) to come down and then I started bumping into walls."

An increasing number of Frankfort's unlawful drug users will occasionally get stoned on pot before going to school or work.

A state official recalls that "at a planning conference my supervisor presented an argument and I couldn't put together a good answer and so I realized that I had to limit my use. Now I fit it into what I want to do in terms of work production."

A freshman at the county high school admits that "sometimes I can't remember my locker combination because I'm so stoned." (Displaying the same poor judgment, he later offered this reporter a marijuana cigarette.)

Other students claim they have little difficulty going to classes stoned.

"There are some instructors who feel it is mandatory to attend their classes," a Kentucky State student said. "If their classes are bad, and you know the material, you've got to do something to bear with it.

"Either you go to class and listen to the _____, or you go stoned and concentrate on something else. You wear your shades (sunglasses) and you wear your high."

Some curious, some rebel

(A chronic marijuana smoker often has bloodshot eyes—thus the sunglasses. Researchers have found that marijuana does not dilate the pupils of the eyes, as many potheads and narcotics agents have claimed.)

A Kentucky State student from a large East Coast city said his occasional heroin sniffing has not caused him any problems, but said he knows a few students "you might call strung out (addicted)—not to the point where they get sick, but where they need it psychologically."

Why do they start using drugs?

Curiosity is a common reason for the initial experimentation.

"If a kid has any curiosity at all, he'll try the pot to see what it is like," said Dr. John Parks, a psychiatrist on the staff of the Comprehensive Care Center in downtown Frankfort. "He isn't supposed to do these things, so he damn well will."

In the early stages of experimentation, a few may be attracted to drugs for rebellious reasons.

"You enjoy pulling the wool over your parents' eyes, over the law, and you enjoy going to school stoned and nobody has the slightest idea," said a college student who was graduated from Franklin County High. 'And it is even better when you get good grades.

"But later it is no longer for rebellion. Because if rebellion is your motivation, you'll be defiant and do your damn best to talk and tell people about it—and then you'll get busted (arrested)."

Some say they smoke pot because there aren't many other forms of entertainment in Frankfort.

"It's also what's happening," said a KSC student in a room filled with marijuana smoke. "It's what people are doing. And it is much better than what students used to do—get drunk."

Among the high school students, perhaps the most important causative factor is the desire to be accepted by the group that uses drugs.

Why do they continue?

The attraction is primarily to the group, secondarily to drugs. Because it is a drug-using group, new initiates use drugs to gain acceptance.

At Franklin County High, the group tends toward longer hair, a trace of hip mannerisms, a bit of hip jargon. They regard themselves as freer spirits, less uptight, more enlightened. They label students with more traditional values "rednecks."

Once they have tried drugs, why do some continue to use it?

The pot smokers, like occasional alcohol drinkers, do it for a remarkably uncomplicated reason: they enjoy it and see nothing wrong with it. But, like a minority of alcohol drinkers, a minority of Frankfort pot smokers abuse marijuana and allow it to become overly important in their lives.

"Pot is a good experience," said a KSC student(glancing out the window of his dormitory room. "It allows me to look at things in a different perspective. Like now I'm more sensitive to sounds. You can appreciate music better with good grass. You get a feeling of well-being. With alcohol you are just out of your head, but marijuana allows you to think about things."

Marijuana is overwhelmingly the main unlawful drug used in Frankfort. The harder drugs are irregular in supply and appear to be used primarily for experimentation and occasional use.

Few in Frankfort who have used dosages of amphetamines and barbiturates (these drugs are legal when prescribed) in quantity sufficient to become high are likely to argue the virtues of these drugs. They know the dangers as well as any narcotics agent. Better, perhaps.

"I don't like speed," a 16-year-old girl at the county high

Staff Photo

A Spotlight shines on a speaker at the recent state conference on drug abuse at Louisville's Convention Center.

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school said. "It damages your body and it isn't a good high. You get so tired, and you use the bathroom 1,000 times, and your mouth gets so dry."

The same attitude is almost universal about heroin.

"Smack is death," said a KSC student, sitting in his room—stoned on grass. "I've seen what it's all about at home."

Most of Frankfort's pot smokers have not tried hallucinogenics. Those who have are ambivalent. They talk about the ecstasies of LSD and mescaline, but they caution about the possibility of a bad trip.

Where do the drugs come from?

Most of the marijuana is picked in Franklin County and other nearby counties. The young people pick it and then give it away or sell it.

Traffic unorganized

The quality of the marijuana is poor and it cannot be sold for much—$10 an ounce at the very most.

(It may take three or more "joints" (cigarettes) of Franklin County marijuana to begin to get stoned, while one joint of good Mexican pot may get five people thoroughly stoned).

There is little organization to drug traffic in Frankfort. A college student brings some from home after Christmas vacation. A high school student picks marijuana in the fall, gives some away, sells a little.

A few students and longhairs are "dealers" only in the sense that they sell with more regularity than others. They make money at it, but probably no more than a few hundred dollars.

Some Frankfort citizens suspect that KSC students are primarily responsible for drugs in the capital city. Not so. Most of the 900 boarding students at KSC are Negro, and so these students and Frankfort have little to do with one another. Only a handful of KSC students know the longhairs downtown.

Other sources of drugs are Cincinnati, Louisville and, especially, Lexington. According to Frankfort drug users, there are student dealers at the University of Kentucky and still more dealers in the longhair community surrounding UK.

Medicine cabinet a source

A state government official said he made $300 selling marijuana last summer.

"I was just financially pressed," he said. "So I sold three pounds at about $60 each and 10 lids (ounces) at $10 each. When I saw I was getting into dealing, it made me think—'What are you getting into?' I realized it wasn't an excitement thing. I just needed the money."

Another source of drugs is the home medicine cabinet. Some youngsters simply get their pills from bottles their parents have long since forgotten.

Like "black beauties," a black amphetamine capsule whose trade name is Biphetamine. Like "red devils," a red barbiturate capsule whose trade name is Seconal.

"One guy's father had a speed prescription," said a Franklin County High student. "So he took his father's

pills and used them. Then he told his father, 'Dad, those things are dangerous. I read about them. So I threw them away for you.'"

What about his own father? "My father thinks I'm an all-American kid," he said confidently. "He doesn't suspect anything."

Frankfort's drug users are fearful about arrest, but not very much.

There have only been 11 drug arrests in Franklin County in the last year, according to state and city police.

Police 'just' react

Until recently, neither department seemed to have the manpower, specialized training or money to tangle with drug investigations.

"The Frankfort police have never raided anybody," said a Frankfort professional who smokes pot. "They don't act on things, they just react to complaints. Like if a mother calls in and complains."

"I was once in a restaurant next to Frankfort police headquarters," a state employe said. "I was stoned and a few joints fell out of my pocket. A cop looked at them and said, 'Uh, he rolls his own cigarettes.' He didn't know."

Frankfort Police Chief Douglas L. True said one of his problems is that he has only 35 men on his force.

"And this isn't an easy matter to detect," he said. "A person who uses drugs doesn't do it publicly.

"Also, this is a rather new field for us. Police in towns this size traditionally work in other areas."

Chief True said he is pleased that the state police are organizing a narcotics squad. He predicted that this will cut down on unlawful drug use in Frankfort.

"And it grows wild around here," he said. "We used to have a hemp factory here and people used to grow it in this vicinity as a cash crop."

Some still do.

The Courier-Journal & Times, Louisville, Ky.—Sunday Morning, January 10, 1971

POT PROBLEM BYPRODUCT: DISRESPECT FOR THE LAW

By Paul M. Branzburg
Courier-Journal Staff Writer

Frankfort, Ky.—Marijuana Is dangerous—in ways that few legislators, educators and public officials suspect.

Talks with a few dozen of Frankfort's pot smokers leave these impressions:

√They have less respect for the law because they consider Kentucky's criminal laws against marijuana ignorant and unfair and transfer their cynicism to laws and lawmakers in general.

√Because pot smokers feel that drug education materials used in Franklin County high schools are filled with

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News analysis

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distortion and propaganda, some are questioning the educational system itself.

√Pot smokers regard the statements and actions of Kentucky officials about marijuana as a combination of stupidity and cheap politics, and many have become somewhat radicalized and suspicious of government as a result.

Pot Smokers Blame Legislators

Could it be that legislators, educators and government leaders are indirectly encouraging disrespect for law, education and government by the way in which they have handled the marijuana issue?

An oversimplification, surely. But a reasonable man could easily come to that conclusion by talking to marijuana users in Frankfort.

To appreciate the young marijuana smoker's disenchantment with the marijuana laws, one only has to raise the subject—and listen to the vehement reply.

"It is the legislators themselves who are responsible for the so-called 'marijuana problem,'" says a state employe. "They've made pot illegal on the basis of no evidence."

"It is ridiculous to put people in jail for something not known to be harmful," says another state employe. "It may be proved to be dangerous, but until it is, it is not right to put people in jail for something that may be proven to be harmless."

(Researchers around the country are now trying to determine if marijuana is physically or psychologically dangerous.)

Some students even argue that law enforcement personnel actually condone the use of hard drugs in ghetto areas.

"It's chemical warfare, man," says a Kentucky State student. "Dugee (heroin) is put in the ghetto to make people passive. I've been able to get my hands on smack (heroin) ever since I was a freshman in high school. But I couldn't go buy a bottle of alcohol. It was easier to get dope than liquor."

The young marijuana users' disenchantment with drug education is every bit as profound as their disillusionment with the law.

Although it drew praise from many—young and old—Gov. Louie B. Nunn's Louisville drug conference on Dec. 3 was a farce, the Frankfort pot smokers say.

"They showed us this stupid film in school where a guy takes one puff of marijuana and then he looks into a mirror and he sees his face turn into a werewolf," laughs a 15-year-old Franklin County High student. "And then the teachers wonder why kids go out and smoke pot."

"At the governor's drug conference," says a freshman college student, "they were propagating all kinds of myths—

like the ridiculous myth that marijuana leads inevitably to the use of heroin. When they say things like that, the kids can only laugh. Even the National Institute of Mental Health has discredited that myth."

"My idea of drug education is to read enough so that when you use dope, you won't abuse it," says another college student.

"Yeah," says a friend. "But the governor's drug conference was a completely nonobjective downer on drugs. All they would talk about is bad effects. They would never have an objective discussion of drug use. Like the pros and cons of marijuana. Like the difference between people who use drugs maturely, and those who abuse them."

Several youngsters in Franklin County say they went to the governor's conference stoned on marijuana. And they are probably telling the truth.

FRANKLIN CIRCUIT COURT

Grand Jury Subpoena

THE COMMONWEALTH OF KENTUCKY

To the Sheriff of Jefferson County, Greeting:

You are commanded to summon Paul Branzburg, Louisville Courier Journal, Louisville, Kentucky to appear before the Grand Jury of Franklin County on the 18th day of January, 1971 at 1:00 p.m., to testify in the matter of violation of statutes concerning use and sale of drugs.

Witness James E. Collins, Clerk of said Court, this 14th day of January, 1971.

(s) James E. Collins, Clerk

By _____, D. C.

FRANKLIN CIRCUIT COURT

In the Matter of Paul Branzburg

MOTION TO QUASH GRAND JURY SUBPOENA

Comes now the Movant, Paul Branzburg, by counsel, and moves the Court that the Grand Jury subpoena issued January 14, 1971, and served upon him on January 16, 1971, be quashed and that the Movant be excused from testifying before the Franklin County Grand Jury.

As grounds for said Motion Movant states that the subpoena calls upon him "to testify in the matter of violation of statutes concerning use and sale of drugs." It would appear that this subpoena is the result of an article appearing in the Courier-Journal and Times of Louisville on Sunday morning, January 10, 1971, written by the Movant. That article dealt with the use and sale of drugs in Franklin County.

The Movant is employed as a reporter for the Courier-Journal in Louisville, Kentucky. For some time he has specialized in articles dealing with the use and sale of drugs in various locations in the Commonwealth. In order to acquire the information set forth in these articles he has gradually won the confidence and trust of those engaged in such activities or having knowledge of such activities. These confidences have enabled him to write informed and balanced stories concerning drug use which would be unavailable to most other newsmen. If Mr. Branzburg were required to disclose these confidences to the Grand Jury, or any other person, he would thereby destroy the relationship of trust which he presently enjoys with those in the drug culture. They would refuse to speak to him; they would become even more reluctant than they are now to speak to any newsman; and the news media would thereby be vitally hampered in their ability to cover the views and activities of those involved in the drug culture.

The inevitable effect of the subpoena issued to Mr. Branzburg, if it not be quashed by this Court, will be to suppress vital First Amendment freedoms of Mr. Branzburg, of the Courier-Journal, of the news media, and of those involved in the drug culture by driving a wedge of distrust and silence between the news media and the drug culture. This Court should not sanction a use of its process entailing so drastic an incursion upon First Amendment freedoms in the absence of compelling Commonwealth interest in requiring Mr. Branzburg's appearance before the Grand Jury. It is insufficient merely to protect Mr. Branzburg's right to silence after he appears before the Grand Jury. This Court should totally excuse Mr. Branzburg from responding to the subpoena and even entering the Grand Jury room. Once Mr. Branzburg is required to go behind the closed doors of the Grand Jury room, his effectiveness as a reporter in these areas is totally destroyed. The secrecy that surrounds Grand Jury testimony necessarily introduces uncertainties in the minds of those who fear a betrayal of their confidences. The sensitive news sources developed by Mr. Branzburg place no price or exaction upon their continuing relationship save confidence in the discretion of Mr. Branzburg. In the nature of things that confidence is destroyed with the closing of the doors to the Grand Jury room behind a reporter. When, in a case such as this, there is a conflict between the rights of secret interrogation of the Grand Jury and basic First Amendment rights, it becomes appropriate to inquire into the need here for the particular incursion. Clearly, the thrust here is to make the reporter an investigative arm of the police. First Amendment freedoms cannot long survive in such a role.

Recently the United States Court of Appeals for the Ninth Circuit in the case of Earl Caldwell and New York Times Company v. United States of America (November 16, 1970) (unreported as yet), dealt with a situation exactly

the same as involved here. That Court held that the reporter should not be required to enter the Grand Jury room. Our own Court of Appeals of Kentucky is presently considering the application of that case to an earlier matter involving your Movant here, the case of Paul Branzburg v. J. Miles Pound (November 27, 1970, Petition for Rehearing under consideration).

Movant's rights clearly are protected under the First and Fourteenth Amendments to the Constitution of the United States, Sections 1, 2 and 8 of the Constitution of Kentucky and KRS 421.100.

Wherefore, on the basis of the First and Fourteenth Amendments to the Constitution of the United States, Sections 1, 2 and 8 of the Constitution of Kentucky and KRS 421.100, the Movant respectfully prays that this Court enter an Order quashing the subpoena in question and excusing the Movant from entering the Grand Jury room in connection with any investigation into "the matter of violation of statutes concerning use and sale of drugs."

Wayatt, Grafton & Sloss
Third Floor
Marion E. Taylor Building
Louisville, Kentucky 40202

(s) Edgar A. Zingman
Counsel for Movant

ORDER

Motion denied, subject to entry of a protective order in accordance with the opinion of the Court of Appeals for the Ninth Circuit in the case of Calwell v. United States, such Order to be considered at 4 p.m., Friday, January 22, 1971.

Entered January 18, 1971.

(s) Henry Meigs, Judge,
Franklin Circuit Court

FRANKLIN CIRCUIT COURT

In the Matter of: Paul M. Branzburg

PROTECTIVE ORDER

Paul M. Branzburg, Staff Writer for the Louisville Courier Journal, having been subpoenaed to testify before the January 1971 Franklin County Grand Jury, and he having, by counsel, moved to quash said subpoena, and the Court having heard arguments of counsel for Paul M. Branzburg and the Commonwealth, and the Court being advised, It Is Hereby Ordered:

1. That Paul M. Branzburg shall not be required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination to the public through the press or other news media.

2. That specifically, without limiting paragraph 1, Paul M. Branzburg, shall not be required to answer questions concerning statements made to him or information given to him by persons interviewed by him unless such statements or information were given to him for publication or public disclosure.

3. That, to assure the effectuation of this order, Paul M. Branzburg shall be permitted to consult with his counsel at any time he wishes during the course of his appearance before the Grand Jury.

4. That nothing in paragraphs 1, 2 and 3 of this order shall be construed to permit Paul M. Branzburg to refuse to answer any questions which concern or pertain to any criminal act, the commission of which was actually observed by Paul M. Branzburg. In accordance with the foregoing, the Motion to Quash the subpoena is hereby overruled.

Entered this 22nd day of January, 1971.

(s) Judge Meigs
Judge, Franklin Circuit Court

PETITION FOR TEMPORARY AND PERMANENT RESTRAINING ORDER AND WRIT OF PROHIBITION

Comes now Paul Branzburg, by counsel, pursuant to RCA 1.420 and C.R. 81, and for his petition states as follows:

(1) The Respondent against whom relief is sought is the Honorable Henry Meigs, Judge, Franklin Circuit Court, Franklin County Courthouse, Frankfort, Kentucky.

(2) The facts entitling Petitioner to relief are:

(a) Petitioner is an individual employed as a news reporter by the Courier-Journal & Louisville Times Company, a Kentucky corporation.

(b) Petitioner's duties as a reporter require Petitioner to seek out and contact sources of news information, to then write stories based upon the facts he has observed and to have such stories published in the newspapers published by his employer in Jefferson County, Kentucky, for distribution and sale in Jefferson County, Kentucky, throughout the Commonwealth of Kentucky, including Franklin County, Kentucky, and in various places in the United States. Many of the facts obtained for said stories are gained solely through confidential sources of information, and, but for reliance on Petitioner's agreement to keep said sources confidential, this information would not be disclosed to the Petitioner.

(c) In the January 10, 1971, issue of the Courier-Journal and Louisville Times, there appeared a story written by Petitioner based upon information confidentially acquired concerning the use of illegal drugs and narcotics in Franklin County, Kentucky. A copy of the story is attached hereto and made a part of this petition. The information acquired for use and publication in said story was gained confidentially by Petitioner in his capacity as a newspaper reporter.

(d) On January 18, 1971, the Petitioner was subpoenaed to appear before a grand jury sittting in Franklin County, Kentucky, to be examined concerning the events and matters which became known to him in the course of his duties as a reporter.

(e) On January 18, 1971, the Petitioner appeared before the Respondent, moved that the subpoena served upon him be quashed, and moved that he be excused from appearing before the Franklin County Grand Jury. Said motions were based upon Petitioner's privilege under the First and Fourteenth Amendments to the Constitution of the United States as interpreted by the United States Court of Appeals for the Ninth Circuit in Caldwell v. United States, No. 26,025 (Nov. 16, 1970), upon Petitioner's privilege under Sections 1, 2 and 8 of the Constitution of the Commonwealth of Kentucky, and upon KRS 421.100.

(f) After hearing arguments of counsel, the Respondent overruled Petitioner's motions and directed that Petitioner appear before the Grand Jury and answer the questions posed to him by the Grand Jury. Respondent further announced that in event the Grand Jury should report to the Respondent that the Petitioner had refused to answer questions, the Respondent would pursue the provisions provided for dealing with contempts of court.

(g) If Petitioner is forced to appear before the Grand Jury, or forced to disclose any information given to him in confidence, he will suffer serious and irreparable harm and damage, because his ability to procure confidential information will be severely limited or destroyed.

(3) The Respondent's action in ordering the Petitioner to appear before the Grand Jury is clearly violative of his rights and privileges as provided under KRS 421.100 and under Sections 1, 2 and 8 of the Constitution of the Commonwealth of Kentucky and the First and Fourteenth Amendments of the Constitution of the United States of America. It is an interference with the exercise of freedom

of the press and would permit courts to destroy that confidential relationship which is essential to a free press and which has been provided for by the Legislature of the Commonwealth of Kentucky and the Constitution of the United States.

(4) The Petitioner, by counsel, respectfully prays that a writ issue from this Court requiring that:

(a) The Respondent, the Honorable Henry Meigs, Judge, Franklin Circuit Court, Franklin County Courthouse, Frankfort, Kentucky, be restrained and prohibited from proceeding against the Petitioner in the matter of contempt proceedings growing out of the exercise by the Petitioner under his privilege under KRS 421.100 and the Constitutions of the Commonwealth of Kentucky and of the United States of America, be ordered to sustain the Petitioner's motions to quash the subpoenas, and be ordered to excuse the Petitioner from appearing before the Grand Jury.

(b) That the entire matter be set down for hearing at a time to be set by this Court for determination upon a permanent writ against the Respondent.

(c) All other necessary and proper relief to which the Petitioner shall appear entitled.

Respectfully submitted,

Wyatt, Grafton & Sloss
300 Marion E. Taylor Building
Louisville, Kentucky 40202
582-1881
Counsel for Petitioner

(s) Edgar A. Zingman
(s) Robert C. Ewald

The Affiant, Paul Branzburg, states that he has read the foregoing petition, and that the statements contained therein are true as he verily believes.

(s) Paul M. Branzburg

AFFIDAVIT

Commonwealth of Kentucky }
County of Jefferson } ss

Paul M. Branzburg, being first duly sworn, states as follows:

He makes this Affidavit in support of the Petition for a Writ of Prohibition in the above matter.

He is 29 years old and for the last 3½ years has been employed at the Louisville Courier-Journal. He is employed in investigative reporting as a member of a special assignment group at the newspaper.

Prior to his employment, he attended Cornell University from which he received an A.B. in 1963, the Harvard Law School from which he received a J.D. in 1966, and the Columbia University Graduate School of Journalism from which he received an M.S. Cum Laude in 1967.

Since his employment by the Louisville Courier-Journal he has written, among others, investigative stories dealing with the use of narcotics, abuse and falsification of agricultural payments, federal, state and local meat inspection programs, automobile thefts, and burglaries.

His work has been recognized on numerous occasions, including receipt of the 1968 Public Affairs Reporting Award of the American Political Science Association for a series on meat inspection; the 1970 Public Affairs Reporting Award of the American Political Science Association for a series on drug use; the 1969 Indiana Associated Press Managing Editors Award for the best feature story written in the State of Indiana that year in its classification; a Certificate of Outstanding Merit representing the I.N.G.A.A.-University of Missouri Business Journalism Award for his stories dealing with abuses under the agricultural subsidy program. He has twice been nominated for the Pulitzer

Prize based upon stories dealing with drugs and with the agricultural subsidies.

Approximately four to five weeks prior to the publication of the story dealing with drug use in Frankfort, Kentucky, he began the preparation of this story. The process of developing such a story is a complicated and tedious one. Information is obtained by moving from contact to contact. This mechanism becomes possible only to the extent that those having information develop trust and confidence in the reporter and develop a feeling of security that their identities will be protected. In the case of the Frankfort story of January 10, 1971, his original contacts led to introductions to persons active and knowledgeable in the drug culture in Frankfort. In other instances, without prior contact, he sought out persons in various locations in Frankfort and managed to develop these on his own. With the passage of time and growing confidence in these relationships, many of these led to additional contacts. The overriding determinant for development of the information was the assurance that the identity of those furnishing him information would not be disclosed. Almost uniformly, the first thing discussed would be the confidentiality of the identity of the informant. Prior to the Court of Appeals decision now under Petition for Rehearing in the case of Branzburg v. J. Miles Pound, he would show his contacts a copy of KRS 421.100 or explain the substance of the statute. Generally, this satisfied the contacts. Since the Court of Appeals decision, supra, much more discussion has been necessary. He has had to convince his contacts that they could rely upon him not to disclose their identities notwithstanding the Court of Appeals opinion. Once this issue is settled another issue that must be worked out is the manner of identification of the contacts in any story he might write. The descriptions used in the stories are generally the result of specific discussion and agreement with his contacts.

These descriptions are intended to protect the identity of the contact. In many instances the contacts seek assurance that if it comes to that point he will go to jail rather than to disclose their identity. In essence, the ability to obtain the information is dependent upon his ability to convince his contacts that they will not be identified through him.

Notwithstanding this, there always remains some measure of distrust upon the part of these individuals. The very fact of going behind the Grand Jury doors, therefore, would lead to suspicion upon their part and an unwillingness to cooperate further. If this Grand Jury appearance were then followed by arrests, these could lead to the possibility of a complete loss of his sources, inability to establish future contacts and even violence. Until the identity of the actual informer was disclosed as a result of testimony at a trial of individuals indicted, he would be under a cloud of suspicion and his effectiveness and ability to operate would be destroyed. In the case of search warrants resulting in arrests and seizure of contraband, the identity of the informer might never be disclosed, which would leave him under a permanent cloud.

Since the onset of these Grand Jury proceedings and the attendant publicity resulting from them, he has already begun to experience the difficulties and the problems referred to above in connection with his investigative reporting activities in other communities. Possible contacts have in some instances refused to discuss drug use with him. In other instances they have seriously questioned whether he can offer them any protection or whether this offer of protection is worth anything in the face of the narrow legal protection granted by this Court and the likelihood that his refusal to go before the Grand Jury would produce a jailing for contempt. In the short period of time these proceedings have been pending, it hs been conclusively demonstrated to him that his ability to continue to do the kind of investigative reporting which he has performed in the past has been

grievously restricted. In his judgment if this situation is not remedied by granting to reporters the privilege not to go behind the doors of the Grand Jury to testify concerning the reporter's investigative activities, the ability to provide this kind of story will be destroyed.

(s) Paul M. Branzburg

ORDER DENYING PROHIBITION AND MANDATORY RELIEF

This cause is before this court on a petition for temporary and permanent orders of prohibition and a petition for mandatory relief. This petition for a temporary order of prohibition, a permanent order of prohibition and mandatory relief is denied. An opinion will follow.

Entered This 22nd Day of January, 1971

(s) James B. Milliken
Chief Justice

OPINION OF THE COURT BY COMMISSIONER VANCE DENYING PETITION FOR ORDER OF PROHIBITION

(Rendered: January 22, 1971)

The petitioner, Paul Branzburg, is a reporter for the Courier-Journal and Louisville Times Company, a publisher of newspapers in Louisville, Kentucky, with statewide circulation. On January 10, 1971, there appeared in the Courier-Journal and Louisville Times a story written by petitioner based upon information acquired by him concerning the use of illegal drugs and narcotics in Franklin County, Kentucky.

On January 18, 1971, the petitioner was subpoenaed to appear as a witness before the Franklin County grand jury to testify in the matter of violation of statutes concerning use and sale of drugs. On that same day, petitioner filed in

the Franklin Circuit Court a motion to quash the grand jury subpoena and sought to be excused from appearing before the grand jury.

The motion to quash was denied and petitioner is now faced with contempt proceedings if he fails to appear before the grand jury as directed. The original action seeks an order prohibiting the judge of the Franklin Circuit Court from proceeding against the petitioner by contempt proceedings and directing said judge to sustain petitioner's motion to quash the subpoena.

Petitioner asserts that he is entitled to this relief by reason of KRS 421.100, §§ 1, 2, and 8 of the Kentucky Constitution and the First and Fourteenth Amendments of the United States Constitution.

KRS 421.100 is a statute providing in substance that no person may be compelled to reveal the source of any information procured or obtained by him and published in a newspaper or by a radio or television station with which he is connected. This statute, interpreted recently by this court in Branzburg v. Pound, Judge, Ky., ____ S. W. 2d ____ (1970), grants a privilege against revealing the source of a reporter's information but does not protect the information itself and does not purport to offer immunity from subpoena.

Sections 1 and 2 of the Kentucky Constitution are not directly related to freedom of the press and in the arguments before this court, the petitioner has not suggested the manner in which either of these sections affords him relief in the present situation.

Section 8 of the Kentucky Constitution provides:

> "Printing presses shall be free to every person who undertakes to examine the proceedings of the general assembly or any branch of the government, and no law shall ever be made to restrain the right thereof. Every

person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty."

This section has been construed by this court in the following language:

"By the provisions of the United States and the state constitutions guarantying [sic] the 'freedom of the press' it was simply intended to secure to the conductors of the press the same rights and immunities that are enjoyed by the public at large. The citizen has the right to speak the truth in reference to the acts of government, public officials, or individuals. The press is guaranteed the same right, but no greater right. The citizen has the right to criticise the acts of the government, provided it is with the good motive of correcting what he believes to be existing evils, and of bringing about a more efficient or honest administration of government. For like purpose and like motive he may criticise the acts of public officials; and, for the honest purpose of better subserving the public interests, he may criticise the fitness and qualifications of candidates for office, not only in respect to their ability, fidelity, and experience, but in respect to their honesty and personal habits. *The press has precisely the same rights, but no more.* (Emphasis ours.) Riley v. Lee, 88 Ky. 603, 11 S. W. 2d 713 (1889).[1]

The general weight of authority is that the First Amendment does not extend a privilege to a reporter's source of information. Judy Garland v. Marie Torre, 259 Fed. 2d 545, (2d Cir.) certiorari denied, 79 79 S. Ct. 237 (1953).

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[1]This case refers to the Kentucky Constitution adopted in 1850 but Article 13, §9 of that Constitution relating to freedom of the press was for all practical purposes identical with §8 of the present Constitution.

The petitioner relies upon a new interpretation of the First Amendment announced in Caldwell v. United States, ____ Fed. 2d ____ (1970), a case decided by the United States Court of Appeals, ninth circuit, on November 16, 1970. In that case, Caldwell was a reporter for The New York Times who specialized in reporting news of the Black Panther Party. A federal grand jury investigating the possibility of Black Panther involvement in crime subpoenaed Caldwell as a witness. He moved to quash the subpoena and presented substantial evidence by affidavit from which it was concluded by the court that even his appearance before the grand jury would infringe the constitutional guarantees of the First Amendment in that (1) it would have a chilling effect upon and would therefore impede his ability to gather news and, (2) it would induce a form of self-censorship in that in deciding what to publish he would consider the possibilities of later subpoena.

The court held that these infringements upon First-Amendment freedom were not justified since it appeared from Caldwell's affidavit that he had no information which was not privileged by a protective order granted him by the district court judge.[2]

The posture of the case thus was that if the reporter appeared before the grand jury, First-Amendment rights would suffer and the government would gain nothing. But, on the other hand, if he were delieved of the obligation to appear, the government would lose nothing and First-Amendment rights would not suffer. A balancing of these competing rights led the court to quash the subpoena, holding, "that where it has been shown that the public's First-Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret grand jury interrogation, the government must respond by demonstrat-

[2]The district judge refused to quash the subpoena but did give Caldwell a protective order substantially similar to the protection given by KRS 421.100.

ing a compelling need for the witness' presence before judicial processes properly can issue to require attendance."[3]

It is important to keep in mind that the issue is not the protection of the petitioner's source of information since those sources are protected by KRS 421.100. The only question here is whether, conceding the right to protect sources of information, petitioner can be required even to appear before the grand jury?

Petitioner does not bring himself within the rule announced in Caldwell. Whereas Caldwell presented substantial evidence that his appearance before the grand jury would have a chilling effect upon his sources of information, the record before us contains no evidence other than petitioner's allegation that the genereal public, or the drug-using portion of it, would be so chilled by the mere appearance of Mr. Branzburg before a grand jury that it would cease speaking to him or furnishing information to him. The conclusion that such a chill would in fact occur is not necessary by implication for, after all, these people were speaking to him and furnishing information to him before he wrote the story in question and at that time they certainly had no assurance that he might not be required to appear at some time before a grand jury.

In the second place, a major factor in the Caldwell decision was an affidavit by Caldwell that he did not have any information which would not be privileged by the protective order and that his appearance before the grand jury would be an exercise in futility.

In this case, petitioner has not filed any similar affidavit and a reading of the story published by him regarding use of illegal drugs in Franklin County, Kentucky,

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[3]We quote this language from the Caldwell opinion because of its reference to the public's First-Amendment right to be informed, whereas the express language of the First Amendment prohibits the enactment of any law abridging freedom of the press or freedom of speech.

would induce a reasonable belief of the probability that petitioner may have witnessed the commission of various crimes in Franklin County, involving either the sale, use or possession of drugs or narcotics. Thus we do not believe that petitioner is within the rule announced in Caldwell v. United States, supra.

Aside from this we have misgivings about the rule announced in Caldwell. It represents a drastic departure from the generally recognized rule that the sources of information of a newspaper reporter are not privileged under the First Amendment.

The grand jury, itself a bulwark of freedom specifically recognized by the United States Constitution, is deeply embedded in the philosophy of human rights, dating back to early English law. Historically its function has been the investigation of charges of crime, but it is not an arm of the police. It is an instrument of the people, which on one hand insulates citizens from over-zealous prosecution, yet on the other hand has broad power to investigate criminal activities and other matters detrimental to the public interest.

The proceedings before a grand jury are secret and one ground of justification for secrecy is the protection that it affords to those who may be the subject of investigation on charges which prove to be without merit.

In Blair v. United States, 250 U. S. 273 (1919), it was held that attendance before grand juries in answer to subpoena is a public duty which every person is bound to perform and that the personal sacrifice involved is a part of the necessary contribution to the welfare of the public.

Any restriction upon the right of a grand jury to compel attendance of witnesses before it is a direct and obvious impediment to its functioning, but whether compulsory attendance is an infringement of First-Amendment rights is much less evident. Some day a situation may arise in which compulsory attendance before a grand jury would so ser-

iously jeopardize constitutional rights as to require quashing the subpoena, but such a situation is not presented by the facts of this case.

The speculation that the mere appearance of a news reporter before a grand jury might jeopardize his rapport with the segment of society known as the drug culture, causing its loss of confidence in him and thereby inhibiting his ability to obtain information, is so tenuous that it does not, in the opinion of this court, present an issue of abridgement of the freedom of the press within the meaning of that term as used in the Constitution of the United States.

The petition for order of prohibition and order directing that subpoena be quashed is denied.

All concur.

Attorneys for Petitioner: Edgar A. Zingman, Louisville, Ky.
Wyatt, Grafton & Sloss,
(300 Marion E. Taylor Bldg.)

COURT OF APPEALS OF KENTUCKY

Original No. F-213-69

Paul Branzburg - - - - - - - Petitioner

v.

J. Miles Pound, Judge, Jefferson Circuit Court, Criminal Branch, Second Division - - - - - Respondent

Original No. W-29-71

Paul Branzburg - - - - - - - Petitioner

v.

Henry Meigs, Judge, Franklin Circuit Court - - - - Respondent

MOTION FOR AN ORDER STAYING THE EFFECTIVE DATE OF THE COURT'S ORDER

Pursuant to Rule 1.345 R.C.A., Petitioner Paul Branzburg, by counsel, for the reasons set forth in his Affidavit and the Memorandum filed herewith, respectfully moves the Court to stay the effective date and enforcement of its Order in the above styled actions for 90 days, to allow the Petitioner time to obtain a writ of certiorari from the Supreme Court of the United States.

Wyatt, Grafton & Sloss
Third Floor
Marion E. Taylor Building
Louisville, Kentucky 40202
582-1881
Counsel for Petitioner

(s) Edgar A. Zingman

In the
COURT OF APPEALS OF KENTUCKY
Original No. W-29-71

Paul Branzburg - - - - - - - Petitioner

v.

Henry Meigs, Judge,
Franklin Circuit Court - - - - - Respondent

MOTION FOR A TEMPORARY WRIT OF PROHIBITION

Petitioner, Paul Branzburg, by counsel, for the reasons set forth in his Affidavit and the Memorandum filed herewith in support of this Motion and the Motion for an Order staying the effective date and enforcement of the Court's Order, moves for a Temporary Writ of Prohibition against the Respondent, Henry Meigs, Judge, Franklin Circuit Court, to stay further action in this case to allow the Petitioner time to obtain a writ of certiorari from the Supreme Court of the United States.

Petitioner is technically without a remedy under Rule 1.345 R.C.A., in that there is no enforcement of this Court's Order from which a stay may be granted. However, inasmuch as the Rules of this Court were intended to provide relief in such a situation pending application to the Supreme Court of the United States for certiorari, Petitioner believes that a Temporary Writ of Prohibition would be an appropriate order.

Wyatt, Grafton & Sloss
Third Floor
Marion E. Taylor Building
Louisville, Kentucky 40202
582-1881
Counsel for Petitioner

(s) Edgar A. Zingman

COURT OF APPEALS OF KENTUCKY

File No. F-213-69

Paul Branzburg - - - - - - - Petitioner

v.

J. Miles Pound, Judge, Jefferson Circuit Court, Criminal Branch, Second Division - - - - - - - Respondent

ORDER

The motion of the Petitioner for the court to stay for ninety days the effective date and enforcement of its order herein is denied this 25th day of January 1971.

Concurring: Judges Hill, Milliken, Palmore and Reed. Steinfeld, J., dissents.

(s) James B. Milliken
Chief Justice, Court of Appeals of Kentucky

COURT OF APPEALS OF KENTUCKY

File No. W-29-71

Paul Branzburg - - - - - - - Petitioner

v.

Henry Meigs, Judge,
Franklin Circuit Court - - - - Respondent

ORDER

In this case we have heretofore denied the extraordinary relief sought in view of the limited time the present Franklin County Grand Jury will be in session the Petitioner's motion for a temporary prohibition against the respondent, Henry Meigs, Judge of the Franklin Circuit Court, to stay further action in this case to allow Petitioner to seek certiorari from the Supreme Court of the United States is denied this 25th day of January 1971.

Concurring: Judges Hill, Milliken, Palmore, Reed and Steinfeld.

(s) James B. Milliken
Chief Justice, Court of Appeals
of Kentucky

FILED
MAR 18 1971
E. ROBERT SEAVER, CLE

IN THE

Supreme Court Of The United States

October Term, 1970

~~No. 1001,~~ October Term, 1970

70-85

PAUL M. BRANZBURG - - - Petitioner

versus

JOHN P. HAYES - - - - Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

EDWIN A. SCHROERING, JR.
COMMONWEALTH'S ATTORNEY

CARL C. OUSLEY, JR.
FIRST ASSISTANT COMMONWEALTH'S ATTORNEY

W. C. FISHER, JR.
ASSISTANT COMMONWEALTH'S ATTORNEY
Courthouse Annex
Louisville, Kentucky 40202

Counsel for Respondent

LAWYERS PRINTING COMPANY, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 1381, October Term, 1970

PAUL M. BRANZBURG - - - - - *Petitioner*

v.

JOHN P. HAYES - - - - - - *Respondent*

BRIEF FOR RESPONDENT, HAYES, IN OPPOSITION

OPINION BELOW

The opinion below from the Court of Appeals of Kentucky is reported as Branzburg v. Pound, Judge, Ky., 461 S.W.2d 345 (1970).

JURISDICTION

This case involves review of a State court judgment provided for by 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

I.

Whether the question referred to in the Petition (Question I as to Respondent, Hayes) was raised and decided in the Court below so as to give this Court jurisdiction to review on a Writ of Certiorari.

II.

Whether a newspaper reporter called to testify as a *witness* to a crime can decline to testify by invoking the "freedom of press" provision of the First Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner, a newspaper reporter, refused to answer questions propounded before a Grand Jury of Jefferson County, Kentucky, claiming a privilege not to answer pursuant to the provisions of Kentucky Revised Statutes, Sec. 421.100. The Statute says a newspaper reporter "shall not be compelled to disclose . . . the source of any information procured or obtained by him."

The questions asked Petitioner related to his witnessing an alleged violation of the narcotic laws of the Commonwealth of Kentucky, KRS Chap. 218. The questions propounded are stated on p. 6 of the Petition for Certiorari.

Petitioner had witnessed the possession and compounding of narcotic drugs by persons he admittedly can name and identify. He wrote a newspaper story

about what he witnessed and had a photographer take pictures of the law violation to convince any doubters of the truth of what he witnessed and wrote. The trial Court and the Court of Appeals of Kentucky ruled Petitioner should answer the questions.

ARGUMENT

I.

I. AS THE FEDERAL QUESTION RAISED WAS EXPRESSLY ABANDONED AND NOT DECIDED BELOW, THIS COURT HAS NO JURISDICTION.

Petitioner raised but then expressly abandoned in the Court of Appeals of Kentucky any claim of privilege or right under the First Amendment of the Federal Constitution. Hence, the opinion of the Court of Appeals of Kentucky was limited to the construction of Kentucky Statute, Sec. 421.100. See opinion of Kentucky Court of Appeals, pp. 40-41, Petition for Certiorari.

As the federal question raised was expressly abandoned and not decided below, this Court has no jurisdiction to grant certiorari.

Rule 23-1(f) of the rules of this Court provides in part:

> "*If review of the judgment of a state court is sought,* the statement of the case shall also specify *the stage in the proceedings in the court of first instance and in the appellate court,* at which and *the manner in which,* the federal questions sought

> to be reviewed were raised; *the method of raising them* (e.g., by a pleading, by request to charge and exceptions, by assignment of error); *and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record,* or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portions of the court's charge and exception thereto, assignment of errors) *as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.*" (Emphasis added.)

The subject matter of what indication that a state court's decision turned on a federal question will move the Supreme Court to review it is extensively discussed in Annotations at 84 L.ed. 925 (1940) and 100 L.ed. 1200 (1956). As indicated, and supported by a great mass of authorities from this Court, it is necessary for a petitioner to show that a federal question actually arose in a case (84 L.ed. 927), and that it was actually passed upon and decided by a state court. 84 L.ed. 935.

In *Edelman* v. *California*, 344 U.S. 357 (1953), this Court stated:

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law."

As stated in *Maxwell* v. *Newbold*, 18 How. (U.S.) 511 (1856):

" . . . But to bring that question for decision in this court, it is not sufficient to raise the objection here, and to show that it was involved in the controversy in the state court, and might, and ought, to have been considered by it when making its decision. It must appear on the face of the record that it was in fact raised; that the judicial mind of the court was exercised upon it; and their decision against the right claimed under it."

Petitioner has not shown that the question he raises herein was properly presented and decided in the Court of Appeals of Kentucky so as to give this Court jurisdiction.

II.

II. COMPELLING PETITION WHO WITNESSED A CRIME TO TESTIFY VIOLATES NO FEDERAL OR STATE RIGHT OF PETITIONER.

The First Amendment of the United States Constitution, applicable to the States by the 14th Amendment, says "Congress shall make no law . . . abridging the freedom of speech or the press." Sec. 8 of the Constitution of Kentucky also provides for freedom of speech and press. The highest court of Kentucky has said the provision means that the press has "the same rights and immunities that are enjoyed by the public at large . . . but no more." *Riley* v. *Lee,* 88 Ky. 603, 11 S.W. 713 (1889).

The Commonwealth of Kentucky has made no law abridging freedom of the press in violation of the First Amendment of the Constitution of the United States. On the contrary, it has implemented and ex-

tended freedom of the press by the enactment of KRS 421.100.

> "421.100 (1649d-1) *Newspaper, radio or television broadcasting station personnel need not disclose source of information.*
>
> No person shall be compelled to disclose in any legal proceedings or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected. (1952 c 121. Eff. 6-19-52)"

Compelling Petitioner to testify *as a witness* to the commission of a crime he saw, had photographed and wrote about in his employers' newspaper, in no way violates his rights under the First Amendment of the Constitution of the United States. The Court below told Petitioner he need not reveal under KRS 421.100, supra, the source of his information, but that what he actually witnessed he must reveal the same as any other citizen who witnessed the commission of a crime. Such plainly presents no federal question under the First Amendment nor does it violate any rule of law, Federal or State.

CONCLUSION

As Petitioner's Question I directed against Respondent, Hayes, was expressly abandoned in the Court of Appeals of Kentucky by Petitioner and not passed on by that Court and as no showing of a violation of a First Amendment right has been made by Petitioner, the petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWIN A. SCHROERING, JR.
Commonwealth's Attorney

CARL C. OUSLEY, JR.,
First Assistant Commonwealth's Attorney

W. C. FISHER, JR.
Assistant Commonwealth's Attorney

Courthouse Annex
Louisville, Kentucky 40202
Counsel for Respondent

Dated: March 16, 1971

PROOF OF SERVICE

I, W. C. Fisher, Jr., one of counsel for respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 16th day of March, 1971, I served a copy of the foregoing brief on Edgar A. Zingman, 300 Marion E. Taylor Building, Louisville, Kentucky 40202, counsel for petitioner, by mailing a copy in a duly addressed envelope with first class postage prepaid to said counsel at the above address.

W. C. Fisher, Jr.

FILE COPY

APR 14 19

C. ROBERT SEAVER,

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

~~No. 1001~~ 70-85

PAUL M. BRANZBURG - - - - - Petitioner

versus

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division - Respondent

AND

PAUL M. BRANZBURG - - - - - Petitioner

versus

HENRY MEIGS, Judge, Franklin Circuit Court - - - - - - - - - Respondent

Petition for Certiorari to the Kentucky Court of Appeals

REPLY BRIEF FOR PETITIONER, PAUL M. BRANZBURG

EDGAR A. ZINGMAN
ROBERT C. EWALD
JON L. FLEISCHAKER
WYATT, GRAFTON & SLOSS
300 Marion E. Taylor Building
Louisville, Kentucky 40202
Counsel for Petitioner

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1381

PAUL M. BRANZBURG - - - - - *Petitioner*

v.

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division - - - - - - *Respondent*

AND

PAUL M. BRANZBURG - - - - - *Petitioner*

v.

HENRY MEIGS, Judge, Franklin Circuit Court - - - - - - - - *Respondent*

PETITION FOR CERTIORARI TO THE KENTUCKY COURT OF APPEALS

REPLY BRIEF FOR PETITIONER, PAUL M. BRANZBURG

May it please the Court:

STATEMENT OF CASE IN REPLY

In the brief of the respondent, John P. Hayes, it is contended that in the *Branzburg* v. *Hayes* case the question of petitioner's privilege under the First Amend-

ment to the Constitution of the United States was abandoned in the Court of Appeals of Kentucky, and therefore the petitioner has no standing to raise this issue on a petition for certiorari to the Supreme Court. It is the position of the petitioner that the First Amendment claim was properly raised at the very outset of the case; that it was presented to the Court of Appeals of Kentucky, and that it is properly presented for review before this Court.

ARGUMENT

The respondent, and the Court of Appeals of Kentucky, have taken out of context a phrase in a memorandum filed with the Court of Appeals, and have, on the basis of that phrase, in order to avoid a consideration of the First Amendment rights involved, determined that the petitioner abandoned his First Amendment rights before the Kentucky Court of Appeals.

In considering this abandonment theory, a brief resumé of the proceedings leading up to the Kentucky Court of Appeals decision in the *Hayes* case is necessary.

As shown in the appendix to petitioner's brief, at page 23, objection based on the First Amendment was originally raised by counsel for the petitioner at the time petitioner was first ordered by the lower court to answer the disputed questions. At that proceeding, the petitioner was ordered to return to the grand jury and to answer the questions propounded; the case was then continued until the following morning. In the meantime, petitioner brought an original action in the Ken-

tucky Court of Appeals, seeking relief from that court against the lower court judge, who had ordered the petitioner to respond to the grand jury's questions. Petitioner's pleadings to the Kentucky Court of Appeals, which may be found at page 25 in the appendix to petitioner's brief, show that this request was based also on the First Amendment to the Constitution of the United States. In response to this petition, counsel for the respondent filed a memorandum wherein they cited certain legal authorities opposed to granting of the privilege of a reporter to withhold his source of information to a grand jury. The principal among these authorities was Professor Wigmore's treatise on evidence.

Petitioner then filed with the Court of Appeals a "Supplemental Memorandum" where he more fully discussed the meaning of the term "source of information" as used in KRS 421.100, which was the Kentucky statute involved. This memorandum was by its title supplemental to other arguments which had been put forth by the petitioner, and dealt only with the question of the meaning of the term "source of information" under the applicable statute. Petitioner in the supplemental memorandum noted in passing that there was a constitutional argument involved. Petitioner then dealt with respondent's contention that because Wigmore and other authorities do not approve of such a statutory or common law privilege the Kentucky Court of Appeals should not recognize the applicable statutory privilege.

The particular paragraph where the alleged abandonment occurred is on page 4 of the petitioner's sup-

plemental memorandum and is quoted verbatim as follows:

> Thus, the controversy continues as to whether a newsman's source of information should be privileged. However, that question is not before the Court in this case. The legislature of Kentucky has settled the issue, having decided that a newsman's source of information is to be privileged. Because of this, there is no point in citing Professor Wigmore and other authorities who speak against the grant of such a privilege. The question has been many times debated, and the legislature has spoken.

A reading of that paragraph shows that the petitioner was not abandoning any constitutional right, but was saying that the citation of such authorities as Professor Wigmore was not relevant to the issues involved. As was pointed out by the supplemental memorandum, the question of statutory or common law privilege was not before the Court of Appeals, because the state legislature had already enacted a statute on this point.

The Court of Appeals, in a footnote to its opinion (Pet. App., p. 40), took a sentence from a paragraph at page 2 of the petitioner's supplemental memorandum, followed it with a paragraph from page 4 of the memorandum, and by taking these two quotations out of context made it appear that the petitioner had abandoned his claim for First Amendment protection. It should only be necessary to mention the use of such out-of-context quotations in order to demonstrate that their use is unfair and deceiving.

It must also be noted that this footnote was included only in the Kentucky Court of Appeals' modified opinion, and was included only after the petitioner, in a motion to reconsider, pointed out the failure to pass on the First Amendment question and cited *Caldwell* v. *United States*, 434 F. 2d 281 (9th Cir. 1970), as authority for the First Amendment argument. Both the original and the modified opinion of the Court of Appeals are printed in the Appendix to petitioner's brief at pages 29 and 39, with the only change on this point being the addition of the footnote in the modified opinion. There is no abandonment when the petitioner has repeatedly stated his First Amendment objection and has cited *Caldwell* v. *United States, supra,* in support of his constitutional position.

Even if it is found that there was a technical abandonment of the constitutional issue, which petitioner does not admit, the constitutional issue involved is properly presented to this Court by this petition. Knowing from the decision in *Branzburg* v. *Meigs* (Pet. App., p. 69), the companion case here, that the Kentucky Court of Appeals will not recognize such a First Amendment privilege, a requirement that the petitioner, upon a formal adjudication of contempt, reproceed through these same appellate routes in order to raise this question in a subsequent petition for certiorari would be a fruitless waste of time and effort. In similar situations, where the outcome below is a foregone conclusion, this Court has granted petitions for certiorari in spite of arguments that these last formal but meaningless steps be taken.

Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for an appeal to this Court, but would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to conjested dockets. *Mills* v. *Alabama,* 384 U. S. 214, 217-218 (1966).

CONCLUSION

In conclusion, petitioner submits that he has not at any time abandoned his rights under the First Amendment to the Constitution of the United States. The status of this case is such that it is certain to be presented to this Court after additional proceedings in the Kentucky courts; in such circumstances this Court has held that technical deficiencies shall not prevent the granting of certiorari and a full review of the issues involved.

Respectfully submitted,

EDGAR A. ZINGMAN
ROBERT C. EWALD
JON L. FLEISCHAKER
WYATT, GRAFTON & SLOSS
300 Marion E. Taylor Building
Louisville, Kentucky 40202

Counsel for Petitioner

FILE COPY

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Supreme Court, U.S.
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~~No. 1381~~ 70-85

PAUL M. BRANZBURG, *Petitioner*

v.

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division, *Respondent*

and

PAUL M. BRANZBURG, *Petitioner*

v.

HENRY MEIGS, Judge, Franklin Circuit Court, *Respondent*

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

ARTHUR B. HANSON
888 17th Street, N. W.
Washington, D. C. 20006
Counsel for American Newspaper Publishers Association

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1381

PAUL M. BRANZBURG, *Petitioner*

v.

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division, *Respondent*

and

PAUL M. BRANZBURG, *Petitioner*

v.

HENRY MEIGS, Judge, Franklin Circuit Court, *Respondent*

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Comes now the American Newspaper Publishers Association, by its counsel, and moves this honorable Court for leave to file a brief *amicus curiae* in support of the petitioner, Paul M. Branzburg, on the following grounds:

1. The American Newspaper Publishers Association is a non-profit corporation organized and existing un-

der the laws of the State of New York. Its member newspapers comprise more than ninety percent of the daily and Sunday circulation of newspapers within the United States. In addition, nine newspaper members of the ANPA are located within the State of Kentucky.

2. On May 3, 1971, this Court granted the Petition of Paul M. Branzburg for a Writ of Certiorari to the Kentucky Court of Appeals. On that same day, this Court granted petitions for writs of certiorari in two related cases: *In Re Pappas,* No. 1434, and *United States* v. *Caldwell,* No. 1114. The ANPA, on behalf of its membership, for the reasons hereinafter stated, desires to file a brief *amicus curiae* in all of these three related cases. For this purpose, the ANPA has received consents in the *Pappas* case and in the *Caldwell* case. In addition, counsel for Paul M. Branzburg has consented to a brief *amicus curiae* by the ANPA in this instant case. However, counsel for ANPA personally spoke by telephone with Edwin A. Schroering, Esquire, Commonwealth Attorney for Jefferson County, Kentucky, the attorney for Respondent, Judge John P. Hayes, and has unsuccessfully attempted to contact William Brooke, Esquire, Commonwealth Attorney for Franklin County, Kentucky, the attorney for Respondent, Judge Henry Meigs. In any event, contacting Mr. Brooke would appear to be a fruitless venture at this juncture in that Mr. Schroering has specifically denied consent to the ANPA to file a brief *amicus curiae* in this instant case, hence this motion to the Court.

3. Although the issues in this case surrounding the interpretation of Section 421.100 of the Kentucky Revised Statutes are considered to be important by the ANPA, the transcending Constitutional right of free-

dom of the press is involved in this proceeding. An essential ingredient of this cherished right is the right of the public to be fully and adequately informed of local, national and international news. It is historically clear that the intent of the First Amendment to the Constitution was to provide the public with an untrammeled and uncensored press. There can be no question but that, in order to ensure the free and uncensored flow of information to the public, those engaged in news gathering and reporting must be privileged to hold confidential their sources of information.

4. As has been pointed out by counsel for Mr. Branzburg in his petition, there is a conflict of court decisions in the United States relating to the Constitutional concept of a news reporter's privilege to maintain the confidentiality of his sources of information. Because of this problem and the extreme importance of the Constitutional issues in this case and in the aforementioned related cases of *Caldwell* and *Pappas,* the ANPA respectfully urges this Court to grant this motion so that it may file a brief *amicus curiae* on behalf of its members and the many thousands of news gathering and reporting personnel employed by those members. The ANPA is hopeful that its brief will be of assistance to the Court in resolving the issues presented.

Respectfully submitted,

ARTHUR B. HANSON
888 17th Street, N. W.
Washington, D. C. 20006
Telephone: 298-6161

Counsel for American Newspaper Publishers Association

JUL 1 0 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-85

Supreme Court, U.S.
FILED
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PAUL M. BRANZBURG,

Petitioner,

v.

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division,

and

PAUL M. BRANZBURG,

Petitioner,

v.

HENRY MEIGS, Franklin Circuit Court.

On Writ of Certiorari to the Court of Appeals of Kentucky

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF FOR THE AMERICAN NEWSPAPER GUILD, A.F.L.-C.I.O., C.L.C., AS *AMICUS CURIAE*

IRVING LEUCHTER,
24 Commerce Street,
Newark, New Jersey, 07102,

Counsel for American Newspaper Guild, A.F.L.-C.I.O., C.L.C., as Amicus Curiae.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12 110

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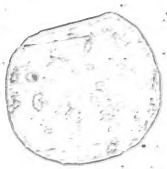

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1381

PAUL M. BRANZBURG,

Petitioner,

v.

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division,

and

PAUL M. BRANZBURG,

Petitioner,

v.

HENRY MEIGS, Franklin Circuit Court.

On Writ of Certiorari to the Court of Appeals of Kentucky

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The American Newspaper Guild, A.F.L.-C.I.O., C.L.C., respectfully moves for leave to file a brief *amicus curiae*

in this case in support of Petitioner, under Rule 42 of this Court. Attorney for the Petitioner has consented The consent of the attorney for respondents, the Commonwealth Attorney of Kentucky, has been requested, but has not been given.

This case presents the broad question whether in the interest of the functioning and maintenance of a free press, a news reporter is protected by the First Amendment against forced disclosure of confidential information received by him in the course of news gathering, and the narrower question whether he is protected against appearance before the Grand Jury to give testimony disclosing such information.

The American Newspaper Guild is a trade union, affiliated with A.F.L.-C.I.O., and with the Canadian Labor Congress. The Guild, through its affiliated Locals, is collective bargaining representative for about 30,000 employees of newspapers and other information media, such as magazines, television and radio broadcaster. Of these perhaps 15,000 are reporters, photographers, editors, editorial writers, and news analysts and commentators. Most are employed by newspapers, but a significant number are employed by magazines and broadcasters.

It is the purpose of the Guild, as set forth in Article I of its constitution, not only to advance the economic interests of its members, but also to protect and improve the standards and practices of journalism.

The questions presented by these cases is of the utmost importance to the membership of the American Newspaper Guild, and they have frequently, through representative conventions of the Guild, expressed their views thereon.

The Guild believes it will be of interest and assistance to the Court to know these views, and the practical and constitutional basis for them. The brief tendered herewith will not burden the Court with unnecessary repetition of facts, but will deal with the basic questions involved generally, as seen by the working newsman.

Respeectfully submitted,

IRVING LEUCHTER,
24 Commerce Street,
Newark, N. J. 07102
Counsel for American Newspaper Guild, A.F.L.-C.I.O., C.L.C., as Amicus Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1381

PAUL M. BRANZBURG,

Petitioner,

v.

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division,

and

PAUL M. BRANZBURG,

Petitioner,

v.

HENRY MEIGS, Franklin Circuit Court.

On Writ of Certiorari to the Court of Appeals of Kentucky

BRIEF FOR THE AMERICAN NEWSPAPER GUILD, A.F.L.-C.I.O., C.L.C. AS *AMICUS CURIAE*

Introduction and Statement of Interest

The membership of the American Newspaper Guild has since its inception been deeply concerned with problems of forced disclosure by newsmen of news data acquired by them in their practice of journalism. This concern has not been merely vocational, but has been with the constitutional role of a free press in a democratic society as well.

The Guild fully supports the position of the Petitioner Branzburg herein. This position reflects the views of the working newsman, as expressed in Guild convention, from the inception of the Guild.

The Guild's 1934 First Annual Convention adopted a Code of Ethics. This Code called on the working newsman "to give the public accurate and unbiased news reports," to work against "the suppression of legitimate news concerning 'privileged' persons or groups" and it declared: "That newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies; . . ."

The Guild's 1959 Twenty-Sixth Annual Convention, reacting to *Garland* v. *Torres*, 259 F. 2d 545 (2d Cir.), cert. den. 358 U. S. 910 (1958) reaffirmed the principles stated in 1934, and resolved:

> "Whereas, a basic principle held by news reporters and editors is that confidences shall be kept and confidential sources of information shall be protected, and
>
> Whereas this principle is fundamental and necessary to the craft of journalism and is based upon the recognition that a newsman who disclosed con-

fidential sources would soon be unable to collect the information necessary to give meaning to a free press. . . ."

Reacting to the first signs of a trend to forced disclosure by subpoena to a newsman to testify the Guild's 1969 Thirty-Fifth Annual Convention by resolution called on Publishers to ". . . resist any attempt by the courts or law enforcement agencies to use newsgatherers as arms of the court in such a manner as to impair their usefulness of newsgatherers." The Guild's 1970 Thirty-Sixth Annual Convention, faced with enormous proliferation of instances[1] in which government, and sometimes defendant's in criminal prosecutions, attempted to force disclosure by newsmen, incorporated into the Guild's Collective Bargaining Program, provisions for Publishers to join with and support the newsman in refusing to make disclosure, to join with and support him in defending against any prosecution resulting from such refusal, and to guarantee him against loss of employment and income as a result of his refusal to disclose.

ARGUMENT

The facts in this case will, of course, be stated in the briefs of the parties. Nor will this brief engage in unnecessary repetition in developing elaborate argument, and in exploring the nice problems raised by the many possible variations and permutations in the

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[1] The 1969 Convention had before it reports of four such instances. But the "Guild Reporter" (the newspaper of the American Newspaper Guild) reports 26 such separate instances in 1970, and 11 in the first half of 1961. These reports certainly cover only some proportion of all cases.

scope and application of the claimed newsman's privilege. This brief, rather, will concisely restate the propositions and principles which the American Newspaper Guild believes entitles the broad newsman's privilege against disclosure, historically espoused by the Guild, to the protection of the First Amendment.

I.

Preservation of the confidentiality of news sources and of unpublished background news information is an essential condition to the effective functioning of a free press in reporting news to the public. Destruction of these conditions by compulsory disclosure therefore abridges freedom of the press, contrary to the First Amendment.

That a free press which informs the people of the course of public affairs is essential to the vitality of American political democracy, and that a purpose of the First Amendment is to protect the press "untrammelled" in that role, is beyond dispute. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1936).

But the press cannot inform the people unless its newsmen can maintain communication with news sources, and this is especially true precisely of news of the greatest public significance. Nor is it a matter only of protecting the identity of news sources. These sources supply much background information, but not for publication, without which the newsman could not perceive the relation and flow of events, and could do little but echo official handouts, and without which news commentary and analyses would be impossible. Disclosure of such confidences will as quickly destroy communication between newsman and

news sources as the direct disclosure of the identity of news sources.

The working newsman has always known that forced disclosure will cut communication with news sources and so severely limit the scope of news and commentary which the press can report to the public. Hence, the resolutions and position of the American Newspaper Guild, from 1934 to date. The fact of the destructive consequences of forced disclosure on the flow of news from source to publication is now fully documented by the affidavits of prominent newsmen, submitted in the *Caldwell* case below. MARGARET SHERWOOD: *"The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation"*, 58 Cal. Law Rev. 1198 (Oct., 1970), notes 26 to 37 at 1204-1206, and notes 185 to 192 at 1232-1234. The opinion of the Court of Appeals in the *Caldwell* case, referring to these affidavits, says: "The fact that the subpoenas would have a 'chilling effect' on First Amendment freedoms was impressively asserted in affidavits of newsmen of recognized stature, to a considerable extent based upon recited experience." 434 F. 2d 1081, 1084, and the Court of Appeals agrees with the conclusion of the District Court that forced disclosure "jeopardizes" confidential relationships "and thereby impairs the journalist's ability to gather, analyze, and publish the news", *In the Matter of Caldwell*, 434 F. 2d 1081, at 1085 (9th Cir., 1970).

A free press cannot serve the basic purpose of the First Amendment to enlighten the people, unless it is an informed press. "For without an informed and free press there cannot be an enlightened people." Mr. Justice Stewart, in *New York Times* v. *United States* and *United States* v. *Washington Post*, —— U. S. ——, Nos. 1873 and 1885, June 30, 1971. What its newsmen do not know, the press cannot publish.

Thus, a government which uses its legal powers to force disclosures of news sources and confidences from newsmen, in fact seriously curtails the ability of the press to gather, and necessarily, to publish news, and thus abridges the press freedom which the First Amendment guarantees.

II.

The First Amendment bars government from compelling the press to function as an investigative agency of government.

Forced disclosure by newsmen by subpoena to testify is now common occurrence. Note 1, *supra.* Disclosure is by no means confined to identification of confidential sources and unpublished information. Newsmen are called on to verify published accounts of public men, and news photographers especially, to identify persons participating in open and public activity. Government thus has come to rely extensively on the ability of the press, through its newsmen, to learn and record facts publicly observable and equally available to government police and other investigative agencies. What advantage the newsman has is precisely that he is recognized as a newsman and not a police agent. He will not be able to acquire facts freely, to probe, question, investigate, if he is recognized as a potential government informer. Common knowledge that any newsman may be transformed into police agent by subpoena is undoubtedly one of the many reasons for the increasing frequency of violence by police as well as participants in public demonstrations and other events against newsmen, to prevent them from observing and recording the facts. Sherwood, "The Newsman's Privilege", *supra,* at 1207, notes 39, 40. See,

Schnell v. *City of Chicago*, 407 F. 2d 1084 (7th Cir., 1969). Not only does the prolific use of the subpoena impress a governmental function on the press; the practice, in addition to destruction of communication with confidential news sources, significantly impairs the ability of the newsman to report public events of great significance. Thus, the Court of Appeals in the *Caldwell* case:

> "The very concept of a free press requires that the news media be accorded a measure of autonomy; that they should be free to pursue their own investigations to their own ends without fear of governmental interference, and that they should be able to protect their investigative processes. To convert news gatherers into Department of Justice investigators is to invade the autonomy of the press by imposing a governmental function upon them. To do so where the result is to diminish their future capacity as news gatherers is destructive of their public function." 434 F. 2d at 1086.

III.

A newsman should not be required to appear for secret interrogation about facts he has acquired in the course of news gathering activity, regardless of any element of confidentiality.

For the reasons stated in Point II, this *amicus curiae* urges the view that a newsman is protected against the verification of published news stories and photographs, or to testify about facts acquired by him as a newsman, published or not, whether or not received in confidence, and whether or not descriptive of events publicly observable.

If that be a valid position, then, when the purpose of requiring a newsman to appear for secret interrogation, is to question him about facts acquired by him as a newsman, the constitutional privilege is as broad as the potential inquiry, and the appearance is futile.

But, since the newsman is questioned in secret, all that can publicly be known is that questions have been directed to his newsman's knowledge. What he answers no one not privy to the inquiry can know. So far as anyone can know to the contrary, he may have made disclosure. The possibility that he has made disclosure has the same potential effect as knowledge that he has. That he is subject to pressure to disclose, and for all anyone can know to the contrary, he may have, is enough.

Therefore, the newsman's First Amendment privilege fails its constitutional purpose if the newsman is required to appear before a secret investigative body for interrogation into his newsman's knowledge. To be effective, the privilege must protect him against appearance, and not merely against answering questions about privileged subject matter.

CONCLUSION

The order of the Kentucky Court of Appeals should be reversed.

Respectfully submitted,

IRVING LEUCHTER,
24 Commerce Street,
Newark, N. J. 07102,
Counsel for American Newspaper Guild, A.F.L.-C.I.O., C.L.C., as Amicus Curiae.

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Supreme Court, U.S.
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JUL 16 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 70-85

PAUL M. BRANZBURG - - - - - Petitioner

versus

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division - Respondent

AND

PAUL M. BRANZBURG - - - - - Petitioner

versus

HENRY MEIGS, Judge, Franklin Circuit Court - - - - - - - Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR PETITIONER, PAUL M. BRANZBURG

EDGAR A. ZINGMAN
ROBERT C. EWALD
JON L. FLEISCHAKER
300 Marion E. Taylor Building,
Louisville, Kentucky 40202,
Counsel for Petitioner

July 15, 1971

WESTERN LITHO-KENTUCKY CO., INC., 500 W. CHESTNUT, LOUISVILLE, KY.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term

No. 70-85

AUL M. BRANZBURG. . . . . .Petition

versus

OHN P. HAYES, et al . . . . . Responden

ON WRIT OF CERTIORARI TO THE COURT
OF APPEALS OF KENTUCKY

ERRATUM

The following citations at pages iii and 13 were in
vertently incomplete and should read:

Associated Press v. KVOS, 80 F.2d 575 (9th Cir. 193
rev'd, 299 U.S. 269 (1936)

Providence Journal Co. v. McCoy, 94 F. Supp. 186
(D.R.I. 1950), aff'd, 190 F. 2d 760 (1st Cir. 195
cert. denied, 342 U.S. 894 (1951)

All references to the foregoing decisions should be
leted from the brief at pages iii and 13.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 1381

PAUL M. BRANZBURG - - - - - *Petitioner*

v.

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division - - - - - - - *Respondent*

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HENRY MEIGS, Judge, Franklin Circuit Court - - - - - - - *Respondent*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR PETITIONER, PAUL M. BRANZBURG

OPINIONS BELOW

The opinion of the Kentucky Court of Appeals re Respondent Hayes (*Branzburg* v. *Pound*) (App. 22) has been officially reported at 461 S. W. 2d 345; the opinion of the Kentucky Court of Appeals re Respondent Meigs (App. 55) has not yet been officially reported.

JURISDICTION

The date of entry of the judgments sought to be reviewed is January 22, 1971. This Court has jurisdiction to hear this case under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

The Constitutional provision here involved is the First Amendment to the Constitution of the United States, which is set out verbatim as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment is made applicable to the state action here involved by reason of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which is set out verbatim as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the First Amendment to the Constitution of the United States prohibits a grand jury from compelling a newspaper reporter to disclose confidential information received by him in the course of his newsgathering activities? (*Branzburg* v. *Hayes*)

II. Whether the First Amendment to the Constitution of the United States prohibits a grand jury from compelling a newspaper reporter to enter the grand jury room to respond to inquiry into confidential information received by him in the course of his newsgathering activities? (*Branzburg* v. *Meigs*)

STATEMENT OF THE CASE

This brief is filed on behalf of Paul M. Branzburg, against the Respondents, John P. Hayes, and Henry Meigs, who are judges in state trial courts of general jurisdiction, the circuit courts in Jefferson County and Franklin County, Kentucky. In two separate actions the Respondents overruled the Petitioner's refusals to answer questions asked of him by a grand jury and to appear before a grand jury. His refusals were based on his rights under the First Amendment to the Constitution of the United States. Both courts announced that contempt proceedings would follow continued refusal and set dates for such proceedings. In each case

the Kentucky Court of Appeals affirmed the rulings of the Respondents, and thereby authorized the Respondents to punish Petitioner for contempt of court in the event Petitioner failed to answer certain questions posed by the grand jury in one case, and failed to appear before the grand jury in the other case.

Petitioner was an investigative reporter employed by The Courier-Journal, a daily newspaper published in Louisville, Jefferson County, Kentucky. In his capacity as a reporter for said newspaper the Petitioner made particular efforts to become acquainted with the "hippie community" in Jefferson County and other parts of Kentucky. The Petitioner devoted several newspaper stories and articles to the problem of drug abuse within Jefferson County and other parts of Kentucky. The two newspaper articles which are the subject of the controversy here involved were the result of Petitioner's efforts in this area.

The Respondents are circuit judges in Jefferson County and Franklin County, Kentucky. Under applicable Kentucky law, the circuit judge is the appropriate judicial officer to hold an individual in contempt if the individual improperly refuses to appear before or answer questions posed by a grand jury in the county where the circuit judge is sitting.

The first of these two consolidated cases was brought in the Jefferson County Circuit Court, Criminal Branch, Second Division, before the Honorable J. Miles Pound, the predecessor of the Respondent, John P. Hayes.

The Petitioner wrote an article which appeared in the November 15, 1969, edition of The Courier-Journal (App. 3). This article described with considerable detail the efforts of two young Louisville, Kentucky, residents to produce enough hashish from marijuana to net them an income of $5,000.00 for three weeks of work. The article included a photograph of a pair of hands working above a laboratory table containing what was identified as hashish. The article stated that the individuals involved had received a promise that their names would be held in confidence.

As a result of this article, the Petitioner was subpoenaed before the Jefferson County Grand Jury and was asked to identify persons mentioned in the newspaper article. The Petitioner refused to answer these questions, and pursuant to the applicable rules the Petitioner was brought before the Circuit Judge, where the foreman of the grand jury read to the Judge the following questions which the Petitioner had refused to answer:

> 1. On November 12, or 13, 1969, who was the person or persons you observed in the possession of marijuana about which you wrote an article in The Courier-Journal on November 15, 1969?
>
> 2. On November 12, or 13, 1969, who was the person or persons you observed compounding marijuana, producing the same to a compound known as hashish?

After hearing argument of counsel based upon First Amendment freedom of the press guarantees,

the Court ordered that the Petitioner answer these questions (App. 6).

Counsel for Petitioner immediately filed a petition for temporary and permanent relief in the Kentucky Court of Appeals (App. 8). On November 25, 1969, the Kentucky Court of Appeals granted a Temporary Order of Prohibition pending review of the case on its merits (App. 12). The Petitioner requested relief pursuant to the First and Fourteenth Amendments to the Constitution of the United States, as well as a Kentucky statute, KRS 421.100 (App. 9), which granted newspaper personnel immunity from disclosing a "source of information."

On November 27, 1970, the Kentucky Court of Appeals determined that the phrase "source of information" in the Kentucky statute did not protect information obtained by the reporter's personal observation, and thus decided that the Petitioner had no immunity under the statute in this particular case. The Court of Appeals also rejected the Petitioner's First Amendment arguments (App. 13).

Pursuant to the rules of the Kentucky Court of Appeals, Petitioner filed a Motion to Reconsider, citing the November 16, 1970, decision of the United States Court of Appeals for the Ninth Circuit in *Caldwell v. United States*, 434 F. 2d 1081 (1970). The Petitioner urged the Court to reconsider Petitioner's First Amendment arguments (App. 21).

In the case involving the Respondent Meigs, the Petitioner wrote an article concerning the use of marijuana and other drugs in Franklin County, Kentucky,

which appeared in The Courier-Journal & Louisville Times on January 10, 1971 (App. 30).

Petitioner was subpoenaed to appear before the Franklin County Grand Jury on the 18th day of January, 1971, to testify in the matter of "violation of statutes concerning the use and sale of drugs" (App. 42).

Petitioner appeared before Judge Meigs on January 18, 1971, and moved the Respondent to quash the grand jury subpoena and excuse the Petitioner from testifying before the Franklin County Grand Jury. The motion was based on Petitioner's First Amendment rights under the Constitution of the United States (App. 43).

Judge Meigs denied the Petitioner's motion, but issued a protective order in regard to the testimony of the Petitioner before the grand jury (App. 46).

Petitioner immediately petitioned the Court of Appeals of Kentucky for a writ prohibiting Judge Meigs from requiring Petitioner's appearance before the grand jury and ordering Judge Meigs to quash the subpoena issued by the grand jury (App. 47).

On January 22, 1971, the Court of Appeals modified its opinion in *Branzburg* v. *Pound,* (App. 22), thus denying Petitioner's Motion to Reconsider, and also denied Petitioner's request for writs of prohibition and mandamus in the *Meigs* case (App. 54). The Court of Appeals followed the *Meigs* order with an opinion in which it refused to recognize Petitioner's First Amendment rights in the particular situation involved and specifically rejected the holding of the Court of

Appeals for the Ninth Circuit in *Caldwell, supra* (App. 55).

Petitioner then moved for an order staying the effective date of the order of the Court of Appeals in both the *Pound* and *Meigs* cases until Petitioner could obtain a Writ of Certiorari from the Supreme Court (App. 29 and 63). In addition, Petitioner moved for a temporary writ of prohibition against Respondent Meigs pending action upon application to the Supreme Court for a Writ of Certiorari (App. 62). The Court of Appeals denied the requested stays and writ (App. 29 and 63).

On January 26, 1971, Mr. Justice Stewart temporarily restrained Respondents from compelling Petitioner to appear before the grand juries in Jefferson County or Franklin County, Kentucky, pending action by the Supreme Court upon a Petition for Certiorari. On February 23, 1971, the Petitioner filed a joint Petition for a Writ of Certiorari to the Kentucky Court of Appeals, pursuant to Rule 23 of the Supreme Court, seeking a review by this Court of both cases. On May 3, 1971, certiorari was granted in both cases.

The Petitioner seeks a determination from this Court that there is a First Amendment privilege permitting a newsman to refuse to appear before a grand jury and to refuse to testify before a grand jury concerning knowledge acquired by the newsman under confidential circumstances in the course of his occupation.

SUMMARY OF ARGUMENT

A. Newsgathering activities are essential to the effective functioning of a free press, and as such are protected by the First Amendment to the Constitution of the United States. A significant portion of such newsgathering activities is the development by individual reporters of confidential informants who give information to the reporter with the understanding that some or all of the information or the source of such information will not be revealed.

B. The courts below are attempting to force the Petitioner to appear before a grand jury to answer questions pertaining to the identities of such informants and unpublished information received from them. Such compelled testimony will inevitably discourge these and other informants from contacting and talking to reporters, as well as discourage the reporter from publishing information gathered from such sources. This inability of the press to be able to obtain such information, or its reluctance to use such information, is a severe abridgment of the freedom of the press protected by the First Amendment.

C. In the light of the foregoing, the First Amendment provides newsmen a privilege against compulsory appearances in closed proceedings and against compulsory disclosure of confidential information. In order to overcome this privilege the state has the heavy burden of proving, by clear and convincing evidence, that the testimony of the reporter is absolutely necessary to prevent direct, immediate and irreparable prospective damage to the national security, human

life or liberty. Any lesser burden does not adequately protect the press from state action which endangers the freedom of the press guaranteed by the First Amendment.

D. In the instant cases the Kentucky Court of Appeals failed to recognize the proper application of the First Amendment to such a situation, and improperly ruled that the Petitioner must appear and testify before the grand juries in closed hearings.

ARGUMENT

I. FREEDOM OF THE PRESS GUARANTEED BY THE FIRST AMENDMENT IS THE CORNERSTONE OF OUR CONSTITUTIONAL EDIFICE AND HAS BEEN SO RECOGNIZED BY THIS COURT. STATE ACTION INHIBITING THE EXERCISE OF FIRST AMENDMENT FREEDOMS IS GENERALLY PROSCRIBED.

This Court has long recognized that the rights protected by the First Amendment are crucial to our political structure, and it has not hesitated to protect these rights against governmental restriction. Freedom of the press occupies a "preferred position." *Murdock* v. *Pennsylvania,* 319 U. S. 105, 115 (1942).

> In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action. *National Association for the Advancement of Colored People* v. *Alabama,* 357 U. S. 449, 461 (1958).

The First Amendment reflects "the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men." *Schneider* v. *State,* 308 U. S. 147, 161 (1939). "The vitality of civil and political institutions in our society depends on free discussion." *Terminiello* v. *Chicago,* 337 U. S. 1, 4 (1949); *Ashton* v. *Kentucky,* 384 U. S. 195 (1966). "[I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected." *Terminiello, supra,* at 4. It is a primary purpose of the First Amendment to secure "the widest possible dissemination of information from diverse and antagonistic sources. . . ." *Associated Press* v. *United States,* 326 U. S. 1, 20 (1945); *see, e.g., De Jonge* v. *Oregon,* 299 U. S. 353 (1937).

Achievement of First Amendment purposes is fundamental to the continuity of our political institutions and the preservation of our cultural and social heritage. Thus, this Court has repeatedly emphasized the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964).

> The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. . . . [S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by free press cannot be regarded

> otherwise than with grave concern. . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1936).

This brief demonstrates that the practices complained of herein are inherently destructive of First Amendment objectives. Compulsory disclosure by a newsman of his confidential sources of information necessarily inhibits future confidences. Compulsory appearance of a newsman before a grand jury or other secret tribunal necessarily conjures up doubts, fears, and distrust restrictive to future confidences.

A. FREEDOM OF THE PRESS PROTECTS ALL ACTIVITIES NECESSARY FOR THE PRESS TO FULFILL ITS FIRST AMENDMENT FUNCTIONS.

The protection afforded the freedom of the press by the First Amendment has long been acknowledged to include more than simply the freedom to publish.

> "The evils to be prevented (by the First Amendment) were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essention to prepare the people for an intelligent exercise of their rights as citizens." *Grosjean, supra,* at 249-50 (*quoting* 2 Cooley, Constitutional Limitations, 8th ed., p. 886). *See also, Talley* v. *California,* 362 U. S. 60 (1960).

Clearly, limitation of freedom of the press to publication *per se* would render the right ineffectual.

Thus, "[l]iberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *In re Jackson,* 96 U. S. 727, 733 (1878).

Similarly, the newsgathering process is as essential to the ability of the press to fulfill its function as the freedom to publish or the freedom to circulate the final product. *Associated Press* v. *KVOS,* 80 F. 2d 575 (9th Cir. 1935); *cf. Griswold* v. *Connecticut,* 381 U. S. 479 (1965); *Providence Journal Co.* v. *McCoy,* 94 F. Supp. 186 (R. I. 1950). "A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both." 6 WRITINGS OF JAMES MADISON 398 (Hunt. ed. 1906). If the right to gather news is limited, then the right to a free press is correspondingly limited. If the freedom to obtain the information to be published is destroyed, then it is clear that the freedom of the press has likewise been destroyed. Therefore, the right of a news gatherer to seek and obtain the facts and information unrestrained by fear of state harassment is crucial to publication, and the right of the public to receive the facts and information must be guarded by this Court. *Griswold* v. *Connecticut, supra; Lamont* v. *Postmaster General,* 381 U. S. 301 (1965).

The structure of First Amendment freedoms thus clearly includes newsgathering. Newsgathering, therefore, is equally exempt from governmental inhibition,

> [f]or the First Amendment does not speak equivocally. It prohibits any law "abridging the free-

dom of speech or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of the liberty-loving society, will allow. *Bridges* v. *California*, 314 U. S. 252, 263 (1941).

B. THE STATE ACTION IN THE INSTANT CASES DESTROYS THE EFFECTIVE EXERCISE OF FIRST AMENDMENT RIGHTS

The chilling effects of compelling a newsgatherer to appear and to testify before a grand jury or any other forum regarding his confidential informants and confidential information received by him in his capacity as a newsgatherer are clear: The state will have imposed severe limitations on the freedom of press, on the public's right to receive news and information, and on individual rights to speak out on issues of public concern and importance.

In the instant cases the State is claiming the right to subpoena newsmen to appear before a closed session of a grand jury without the burden of showing a compelling and overriding need for the newsman's testimony. The State seeks names of confidential informants without any such demonstration of compelling and overriding need. The decision of the Kentucky Court of Appeals found that the newsman's role in society is no different from that of any other citizen and that no First Amendment rights were involved (App. 57-60). Petitioner submits that such a finding violates the First Amendment and is inconsistent with the holdings of this Court in a multitude of cases.

At best, what the State is seeking to do in each of these cases is enlist the Petitioner and his investigative skills as an arm of the State in its police function. The Petitioner over a period of many months worked to develop a rapport with and earn the trust and confidence of the drug users. This trust and confidence enabled the Petitioner to gain the information passed on to the general public through the news stories here involved. If the state can require the Petitioner to disclose his confidential information to the grand jury after each news story is published, his credibility in keeping confidences will soon be destroyed. Without such confidences news articles such as those involved here would not be published.

For the possibility of one criminal indictment, the State is seeking to take action which will result in a severe limitation of the continuing ability of all newsgatherers to perform their jobs, which jobs are vital to the effective functioning of a free press. By compelling the appearance and testimony of one reporter, the Petitioner, the State will have crippled the capacity of the entire press to report on news and events of interest and importance to the public. Such a continuing limitation on the functioning of the free press cannot be justified by the possibility of one criminal indictment.

The state with its vast resources is well able to employ agents capable of investigating the same activities here investigated by the Petitioner. These state agents also may promise that informants' names will be kept confidential. *See, e.g., McCray* v. *Illinois,* 386

U. S. 300 (1967). A free press cannot long survive when cast in the role of a substitute for the police.[1]

This Court has recognized that the mere appearance before a closed body such as a grand jury may do harm to a person's associations. "The Bill of Rights is applicable to investigations as to all forms of governmental action." *Watkins* v. *United States*, 354 U. S. 178, 188 (1957):

> Abuses of investigative process may imperceptively lead to abridgment of protected freedoms. The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. *Watkins* v. *United States*, *supra*, at 197.

By requiring a newsman to appear before a grand jury or to disclose the names of confidential informants or the nature of confidentially received informa-

[1]There have also been instances where governmental officials have used the subpoena power to harrass informants in order to prevent embarrassing disclosures, rather than achieve any legitimate governmental purpose. Such an instance involved Eugene Patterson, Editor of the Atlanta Constitution, as reported in Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U.L. Rev. 18 (1969). Patterson received confidential information from a physician concerning the use of narcotics inside the Georgia State Prison. A grand jury was called, Patterson appeared and produced extensive evidence of drug sales and use inside the prison, but the district attorney showed no interest in this information about illegal activity. Apparently the district attorney's only interest was in identifying the source of Patterson's information. Although Patterson refused to reveal the sources when threatened with contempt, the physician finally came forward and identified himself. Upon learning the physician's name, the grand jury immediately adjourned without investigating the prison and without even calling the physician to testify.

tion the state deprives that reporter of one of his fundamental methods of obtaining information. By interfering with the newsgathering process the state has made severe inroads on the fundamental freedoms guaranteed to the press under the First Amendment.

In like manner, calling a reporter before a grand jury to question him about confidential information received in his capacity as a newsman is a measure of governmental interference. Such interference cannot be tolerated unless compelling and overriding government interference with the operation of the press cannot be tolerated.

> [T]he protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful.
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> * * *
>
> [I]nhibition as well as prohibition against exercise of precious First Amendment rights is a power denied to government. *Lamont* v. *Postmaster General,* 381 U. S. 301, 308-309 (1965), (Brennan, J., concurring).

The means by which the state can restrict and impede the exercise of First Amendment freedoms are varied, but among the most efficient is to harrass newsmen by issuance of subpoenas for their testimony. Inhibition, by any means, of the exercise of these essential freedoms cannot be tolerated.

1. STATE ACTION WHICH DISCOURAGES THE FLOW OF INFORMATION BETWEEN CONFIDENTIAL INFORMANTS AND NEWSGATHERERS VIOLATES THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In many cases confidential sources of information are available to newsmen only because the newsman has promised, either expressly or by implication, to protect the identity of his source. It would seem to be evident from a reading of any modern newspaper that many items of news are received from confidential informants.[2] Such phrases as "highly placed government officials" or "a reliable source" are very much a part of the newspaper vocabulary. In the present cases, the article which brought on the grand jury investigation in Jefferson County specifically indicated that the information had been given only after a promise of confidentiality (App. 3), and the consistent omission of names in the other text leaves no doubt that an understanding existed regarding the disclosure of those names. The affidavit submitted by the Petitioner to the Kentucky Court of Appeals in the *Meigs* case (App. 51) illustrates graphically the difficulties involved in obtaining the information necessary to do a

[2]A significant amount of the news published today is, directly or indirectly, a result of confidential relationships and sources developed by newsmen. Recently a poll was conducted among newspaper editors, including The Courier-Journal, concerning the value of confidentially received information. Responses were received from thirty-seven of the most respected newspapers in the country, with nearly unanimous results indicating that confidentially received information was an essential element of many of the news stories appearing in these publications. Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U.L. Rev. 18 (1969). It would be hard to imagine the *Wall Street Journal*, *Christian Monitor*, and many others without thirty, forty or even fifty per cent of their news articles.

story on illegal use of drugs. Many of these contacts required much persuasion and assurances of confidentiality before revealing any information to the Petitioner.

That compulsory grand jury appearances or compulsory disclosure of confidential informants will be detrimental to the function of the press is recognized by many authorities outside the fourth estate. Thus, as noted in STATE OF NEW YORK, LAW REVISION COMMISSION REPORT, RECOMMENDATIONS AND STUDIES (1949), at pages 131 and 132, the District Attorney of Richmond County, New York, stated:

> If the press and radio are to continue to be an important factor in democracy, they must be as free to gather as to distribute news. . . . If the newspaper man can be compelled to reveal these sources of information from which they obtain facts, then these sources can be shut off. When they are shut off, news becomes subject to censorship and control. When that happens it ceases to be factual, and then it ceases to be news. Any distortion of the news, as it is gathered, taints it right down to the individual reader or listener. When news can be distorted, suppressed, censored or controlled by anyone, it becomes propoganda. Real news is truth. Part of the news is not the truth.

One of the sponsors of the newsman's privilege bill which was introduced in the New York Legislature in the late 1940's, Thomas Desmond, commented on the importance of such a bill:

The newsman is truly a guardian of the public interest. He is the conscience of our legislators, the public's independent auditor, the ferret of dereliction of public duty. Nearly two decades in public life have convinced the author that without the ever present news reporter of a free press our government affairs would be in a disreputable state. Democracy without a free press is no guarantee of freedom.

Anyone familiar with the history of our free press knows that newsmen have fought corrupt judges, bungling politicians, black marketeers, and the stealthy saboteurs of democrary through the antiseptic power of exposure.

Furthermore, the operation of our free press, if we want it to be more than a mere compendium of official propaganda and releases, is dependent upon protecting informants. If they are not protected, the sources of stories will dry up. The fears of our district attorneys that such law might interfere with their tracking down of criminals is groundless, for surely the law enforcement officials, aided by staffs of trained technicians and armed with the latest weapons of science are in a better position to find a criminal than is a reporter whose only equipment is a "nose for the news." Thomas C. Desmond, 13 *Albany L. Rev.*, No. 2, 1, 8 (1949).[3]

The possibility of public disclosure of their identities would often be sufficient to discourage such informants, whose jobs or reputations may well depend on those who are displeased by the information pub-

[3]The instant cases, however, convincingly demonstrate that protection of the fundamental First Amendment rights in issue here cannot be left to the vagaries of state legislation or state court interpretation.

lished. *Cf. Shelton* v. *Tucker,* 364 U. S. 479 (1960). As these sources become less and less willing to give newsmen information to which they alone have access, the result is that news reporting becomes more and more restricted to facts and information already generally available to the public. State action that leads to such a result is state action which is restricting and limiting the freedom of the press.[4]

In *Gibson* v. *Florida Legislative Investigation Committee,* 372 U. S. 539 (1963), the Court addressed itself to a similar problem caused by disclosure in the closely related First Amendment area of freedom of association, and found that a requirement of disclosure of membership lists was unconstitutional.

> While, of course, all legitimate organizations are the beneficiaries of these protections, they are all the more essential here, where the challenged pri-

[4]Because of the nature of the proceedings in this case, the Petitioner was not given the opportunity to present evidence from other sources concerning potential harm to his effectiveness as a reporter if he can be required to appear before a grand jury. Unlike the circumstances present in *Caldwell* v. *United States,* 434 F. 2d 1081 (1970), no burden whatsoever was required of the State prior to compelling the appearance and testimony of the Petitioner before these grand juries. In *Caldwell* an opportunity for a hearing with appropriate burdens and evidences was provided. Demonstration was afforded through numerous affidavits how important confidential sources are to a newsman, and through these same affidavits to show how appearing before a closed session of a grand jury often destroyed the usefulness of these sources. Petitioner's problems with his confidential informants are quite the same as those faced by Caldwell. However, due to the summary nature of the proceedings, with the burden falling entirely upon the Petitioner who only hours before was subpoenaed, opportunity was not given the Petitioner to introduce the wealth of proof presented by Caldwell. The cavalier manner in which Petitioner's constitutional rights were ignored in these cases emphasizes the need for protection of these rights.' The Petitioner's affidavit below (App. 51), forcefully establishes that the prospective evils described in this Brief are real and not fanciful.

vacy is that of persons espousing beliefs already unpopular with their neighbors and the deterrent and "chilling" effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more immediate and substantial. *Gibson, supra,* at 556-557.

Moreover, it is not just the freedom from being compelled to disclose confidential information and the names of confidential informants that a reporter must have in order to acquire the information he needs for his stories, but it is the complete trust and confidence of his informants that is bottomed upon this. In most cases these informants are persons who are in some way involved with the activities which the reporter seeks to uncover, and the informants are naturally suspicious of any dealings which the reporter may have with members of the establishment who might seek to take action against them. It is the association with these authorities which may taint the reporter's character in the eyes of his confidants. The relationship of the reporter with his informant is harmed if the reporter is called to testify before a closed governmental hearing. So long as this confidant does not know what was said by the reporter, he will be suspicious. Even a slight suspicion by a person with something to hide will destroy the channels of communication established between the suspect reporter and the informant, and the public loses an important source of news.

2. STATE ACTION WHICH RESULTS IN SELF-CENSORSHIP BY A REPORTER VIOLATES THE FIRST AMENDMENT.

A second, equally unconstitutional result may arise if the state is allowed to compel such testimony. In order to avoid such a confrontation, reporters may frequently decide not to publish concerning a matter of public concern, learned of through a confidential relationship, rather than subject themselves to legislative or grand jury investigations. Such self-censorship is as inimical to the principles of the First Amendment as direct censorship by the state. *Smith* v. *California,* 361 U. S. 147 (1959). Certainly the result is the same.

Smith, supra, involved a conviction under a Los Angeles municipal ordinance which made it unlawful for any person to have in his possession any obscene or indecent book in any place where books were sold or kept for sale. The ordinance imposed strict criminal liability for such possession. In an opinion by Justice Brennan, this Court reversed the conviction under the ordinance. The Court found that the elimination of the scienter requirement worked a substantial restriction on the freedom of speech and the freedom of the press.

> Our decisions furnished examples of legal devices and doctrines, in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it. *Smith, supra,* at 150-151.

The Court stressed the fact that by dispensing with the scienter requirement, the statute tended to impose a severe limitation on the public's access to constitutionally protected matter, since the seller's tendency would be to restrict the books held for sale to those he had read or inspected. "[T]he bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted." *Smith, supra,* at 153. In the same manner, the threat of being forced to testify in the future as to confidentially received information and confidential sources may well restrict the dissemination to the public in general of information known to a reporter. The self-censorship by the reporter, compelled by the state action, "would be a censorship affecting the whole public, hardly less virulent for being privately administered." *Smith , supra,* at 154.

Such self-censorship amounts, in fact, to a state imposed prior restraint on the individual reporter and his ability to publish the news. The reporter, before allowing any confidentially received information to be published, has to make a decision on whether to publish such information at all and thereby subject himself to possible compelled testimony before a legislative or judicial body. If, as a result of this threat, he decides not to public these facts, than the public is the loser.

This self-censorship, due to the threat of state action, has the same effect as direct censorship imposed by fiat of the state. This Court has recently held that where such prior restraints on the publication of news

were involved, the government has, at the very least, a "very heavy burden," *New York Times Co.* v. *United States,* 39 U.S. L.W. 4879, 4885 (June 30, 1971) (White, J., concurring) to meet in order to justify such a prior restraint on publication. There has been no attempt to meet this burden here.

This Court has long recognized the need to carefully limit any type of prior restraint on the exercise of First Amendment rights. *Near* v. *Minnesota,* 283 U. S. 697 (1931). The right of the state to compel testimony by a newsgatherer in the situation we have here, and the resultant tendency of the newsgatherer to restrict the information and news that he prints, amounts to state imposed prior restraint which cannot be condoned.

> This court had occasion in *Near* v. *Minnesota* (citations omitted) to discuss at some length the subject in its general aspect. The conclusion there stated is that the object of the constitutional provisions was to prevent previous restraint on publications; and the court was careful not to limit the protection of the right to any particular way of abridging it. Liberty of the press within the meaning of the constitutional provision, it was broadly said (p. 716), meant "principally although not exclusively, immunity from previous restraints or [from] censorship." *Grosjean, supra,* at 249.

3. STATE ACTION WHICH DEPRIVES AN INDIVIDUAL OF THE RIGHT TO SPEAK ANONYMOUSLY THROUGH THE NEWS MEDIA VIOLATES THE FIRST AMENDMENT.

The freedom of speech protected by the First Amendment is also endangered by compelling newsgatherers to testify concerning their confidential sources of information. The First Amendment not only protects the right to speak, but also the right to speak anonymously. "[T]here are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified." *Talley* v. *California,* 362 U. S. 60, 65. (1960); *see also, Bates* v. *Little Rock,* 361 U. S. 516 (1960); *National Association for the Advancement of Colored People* v. *Alabama, supra.*

This right to anonymity will be seriously infringed if the state has the right to compel such testimony. *Talley, supra,* involved a Los Angeles municipal ordinance making it a criminal offense to distribute handbills unless they carried the names and addresses of the persons who prepared, distributed or sponsored them. The Court found that such a requirement clearly restricted the "freedom to distribute information and thereby freedom of expression," *Talley, supra,* at 64, since there are people and groups who will not or cannot exercise their freedom of expression without retaining anonymity.

This is exactly the situation in which members of many dissident groups find themselves today. Important issues, such as the legalization of marijuana, the war in Vietnam, and corruption of public officials,

arouse great emotions and often lead to reprisals. Jobs are threatened, economic security may be endangered, and official state action is often a result of individual expressions of minority views. Only by maintaining their anonymity can these people speak out on issues of great public concern without fear of such reprisals, physical harm, or criminal prosecutions.[5]

It is often true that the only effective means such critics have for speaking to the public is by using the various forms of the news media. All other forms of effective communication involve expenditures far too great for the average citizen. *See,* Barron, *Access To the Press—A New First Amendment Right,* 80 HARV. L. REV. 1641 (1967). But only by receiving assurances of confidentiality will these people speak to reporters. By compelling the testimony of these reporters concerning their informants, and thereby discouraging these informants from speaking out, the state deprives these individuals of effective freedom of expression and the right to be heard.

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[5]In the Petitioner's article published November 15, 1969, one of the subjects is quoted as saying, "I don't know why I'm letting you do this story, to make the narcs mad, I guess. That's the main reason." (App. 3) Evidently, this subject did have a desire to speak out but remain anonymous. In the Petitioner's article published January 10, 1971, another unidentified student at Kentucky State University made this statement: "Dugee (heroin) is put in the ghetto to make people passive. I've been able to get my hands on smack ever since I was a freshman in high school. But I couldn't go buy a bottle of alcohol. It was easier to buy dope than liquor." (App. 31) Petitioner submits that it is vitally important that the general public know of such feelings. If the opinion of the Kentucky Court of Appeals is upheld such first hand statements may no longer be published.

II. THERE ARE NUMEROUS EXAMPLES IN THE LAW WHERE COMPELLED TESTIMONY IS DENIED IN ORDER TO PROTECT AND PRESERVE OTHER MORE IMPORTANT RIGHTS AND INTERESTS.

In determining whether the Petitioner's rights under the First Amendment are to be protected here the nature of the state's interest must be examined. Careful scrutiny indicates that the right of the state to compel testimony before a grand jury, in a civil or criminal trial, or before other forums having the power of subpoena, is limited by a variety of exceptions. The majority of the exceptions are based on interests which do not have the primacy of the First Amendment.

Professor Wigmore devotes nearly a full volume to discussion of instances where testimony of a witness cannot be compelled.[6] Our evidentiary rules establish that as between an immediate conviction and the long range preservation of those rights fundamental and essential to our social order, we choose preservation of fundamental rights. We would rather have a guilty man go free than punish a man who is innocent, so we require that guilt be proved beyond a reasonable doubt. In order to prevent the terrible wrongs of the Star Chamber proceedings we exclude from evidence confessions containing even the slightest taint of coercion. We refuse to allow admission of evidence if it is obtained in a search which violates the dictates of the Fourth Amendment, even though such evidence may

[6] 8 J. WIGMORE, EVIDENCE, §§2190-2396 (McNaughton rev. ed. 1961).

present conclusive proof of guilt. The right to compel testimony must similarly defer to the primacy of rights guaranteed by the Constitution. Surely the First, Fourth and Fifth Amendments speak with at least equal voices. The First Amendment was not intended to be a mere supporting player in the constitutional drama.

The problem is one of weighing the interests of society which lie on both sides of the situation.

> From the point of view of society's *right* to our testimony, it is to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole—from justice as an institution and from law and order as an indispensable element of civilized life. *Wigmore, supra,* §2192, at 72-73

This right of a grand jury to investigate must be weighed against that right of the community as a whole to have a free and functioning press to keep it properly informed. As applied to this case, the question is whether it is more important to compel information concerning an alleged violation than to keep the channels of information concerning the widespread drug problem open to the public.

The Petitioner suggests that the answer is clear: one conviction[7] for drug violations is not nearly so important to society as having the public in general

[7]It is not at all apparent that conviction or indictment is the objective here. The subpoenaing of the Petitioner immediately following publication of his artieles, absent any showing of a pre-existing or continuing investigation, appears to be harassment.

more fully aware of the problems faced by that public due to the widespread use of drugs.

While many of the exemptions from compulsory testimony are not wholly analogous to the First Amendment privilege claimed here, the wide variety and range of these exemptions is noteworthy. Clearly, compulsory testimony is often less important than the need to protect a general public interest, granted in the Constitution or not. Thus, there are exemptions in the law for trade secrets and customers' names,[8] for official state secrets[9] and for political opinions and political votes.[10] Preservation of the secret ballot is fundamental to our society. So, for example, where vote tampering itself is the issue, we do not compel voters to disclose how they voted, even though this might be the only way to determine whether in fact there had been tampering. In this situation, the public interest which compels testimony must fall to the more important public interest involving the secrecy of the voting booth.[11]

Widely recognized is the privilege of one to refuse to disclose communications received from his spouse. Lack of an alternative source of evidence notwithstanding, public policy bars the compelled testimony of the spouse.

The privilege against self-incrimination is most fundamental. This privilege deprives the state of evidence of admission and confession, which are among

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[8]WIGMORE, *supra*, §2212(3).
[9]WIGMORE, *supra*, §2212a(4).
[10]WIGMORE, *supra*, §2214(b).
[11]WIGMORE, *supra*, §2214(b).

the strongest forms of proof. Cf, *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

The physician-patient privilege,[12] the priest-penitent privilege[13] and the attorney-client privilege[14] are privileges which, if not recognized, might assist in the identification and conviction of persons guilty of criminal acts. Obviously, the interests served the public in guaranteeing these latter exemptions stand on much less solid ground than many of these other interests herein mentioned, and particularly the interest in the preservation of the freedom of the press involved in the present case.

Perhaps most closely analogous to the reporter's privilege asserted here is the privilege protecting against compulsory disclosure of the names of police informants.[15] Although these informants may have actual knowledge of criminal acts, may in fact be guilty of criminal violations themselves, the right to protect their identity is a right zealously guarded by law enforcement agencies. The reason for this is obvious. The risk of disclosure would shrivel up the sources of information available to the law enforcement agencies through these and other potential informants. Under

[12] WIGMORE, *supra*, §§2380-2391.

[13] WIGMORE, *supra*, §§2394-2396.

[14] Under the common law of England, in the trials of the 1600's the obligations of honor among gentlemen were put forward as sufficient ground for maintaining silence. Thus, if a gentleman received a communication under a promise of secrecy, he would not be required to divulge that communication when called to testify. It was out of this exemption that the attorney-client privilege arose, resting upon the honorable obligations of the attorney not to disclose his client's secrets. WIGMORE, *supra*, §2286 at 543.

[15] *McCray* v. *Illinois*, 386 U. S. 300 (1967).

such circumstances, society through its law enforcement agencies finds it desirable to forego the prosecution of a particular crime to avoid disclosure of the identity of an informant. Balancing the public interest involved, the courts have uniformly upheld the right to protect the names of these informants.[16]

In the present case, the information received by the Petitioner was given only upon a promise of confidentiality. Under the proper circumstances, had the Petitioner been a police officer or an attorney, there is no question that the confidence could be maintained. But since the Petitioner is a member of the press, the Respondents argue that the secrecy cannot be retained. Surely, it is clear that the First Amendment guarantees protect interests as important as those which the other exemptions were created to protect.

Considering the variety and number of privileges recognized by courts in this country exempting compulsory production of certain types of evidence and witnesses, one must conclude that there is no paramount

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[16]Various states have recognized by statute privileges to accountants, psychologists, clerks and stenographers. WIGMORE, *supra*, §2286.

Nor has the Congress of the United States been idle in providing protection to certain types of communications. There are nearly a hundred federal statutes which provide protection of this character for given disclosures. Federal agencies have also created confidences under their rule-making powers, and some agencies treat information as confidential because it is received under an informal pledge of non-disclosure. The proliferation of such non-disclosure statutes and rulings is a clear indication that society has decided that its interest in compulsory testimony is less than its interest in protecting the preservation of other interests. Note, *Privacy and Efficient Government: Proposals for a National Data Center*, 82 HARV. L. REV. 400, 409, n. 46 (1968). Basic First Amendment rights, however, cannot be dependent upon this haphazard legislation or rule-making.

state right to compel the testimony of every possible witness. The demand for compulsory testimony is overridden in many situations by matters of more important public concern. The protection of First Amendment rights and privileges is clearly a matter of such overriding concern. It is only under the most compelling circumstances that the state can be allowed to intrude into this area. The interest of the state in ordinary grand jury investigations cannot override the First Amendment rights and privileges threatened by compelling a reporter to testify as to confidential information and confidential sources.

III. THIS COURT SHOULD DECLARE THAT THE FIRST AMENDMENT CONFERS UPON NEWSMEN THE PRIVILEGE NOT TO BE COMPELLED TO ENTER A CLOSED PROCEEDING AND NOT TO BE COMPELLED TO DISCLOSE CONFIDENTIAL INFORMATION ABSENT A DEMONSTRATION IN A PRIOR OPEN HEARING OF A COMPELLING AND OVERRIDING NEED FOR SUCH.

Consistent with the First Amendment rights demonstrated above, this Court should unhesitatingly declare that there exists a privilege under the First Amendment against compulsory appearances of reporters in closed proceedings and compulsory disclosure from reporters of confidential information. The privilege should state that absent a prior showing in an open hearing of a compelling and overriding need by the government for the information sought, freedom of the press under the First Amendment precludes such compulsion against the reporter.

Where First Amendment rights and privileges are threatened or restricted by state action, whether it is by means of statute, *Sherbert* v. *Verner*, 374 U. S. 398 (1963), a legislative investigation; *Gibson* v. *Florida Legislative Investigation Committee, supra,* or some other form of state action, *see, e.g., Ashton* v. *Kentucky, supra,* it has been consistently required that the state show not only a compelling and overriding need for the action in question, but in addition that there is no less offensive means by which to accomplish an admittedly legitimate objective of the state.

The requirement for the showing by the state of a compelling need has been phrased in numerous ways. *See, e.g., Gibson* v. *Florida Legislative Investigating Committee, supra,* (an overriding and compelling state interest); *DeGregory* v. *Attorney General,* 383 U. S. 825 (1966) (a present danger of sedition); *Watkins* v. *United States, supra,* (a public need that over-balances private rights); *Sherbert, supra,* (the gravest abuses, endangering paramount interest).

It is well settled that the mere fact that the governmental purpose is legitimate and substantial, and that the state action in question is rationally related to a legitimate state purpose is not sufficient. *Shelton* v. *Tucker, supra.*

If the state can achieve its legitimate ends by other, less restrictive means, then the Constitution compels the state to do so. It is incumbent upon the state "to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Sherbert* v. *Verner, supra,*

at 407. *Schneider* v. *State,* 308 U. S. 147 (1939), is such a case. There municipal ordinances of several cities provided that handbills were not to be distributed on the streets. The courts below had sustaining the validity of the ordinances on the ground that they were rational means with which to deal with the legitimate state problems of littering and fraud.

This Court, in an opinion by Justice Roberts, found that the ordinances were unconstitutional as an abridgment of the First Amendment. The Court stated that

> [i]n every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. *Schneider, supra,* at 161; *see also Bridges* v. *California,* 314 U. S. 252 (1941).

Directing itself to the problems of littering and fraudulent appeals, problems created by the use of such handbills which the state was trying to solve, the Court stated that there were other means, less offensive to the principles of the First Amendment, by which the state could achieve the desired purpose.

> Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police au-

> thorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press. *Schneider, supra,* at 164.
>
> Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print, or circulate information or opinion. *Schneider, supra,* at 160.

This consideration of alternative means for achieving legitimate state ends is not limited to cases dealing with the First Amendment. Time and again this Court has emphasized that the state is under an obligation in a criminal trial to shoulder the burden of proving its case by valid means. *See, e.g., Miranda* v. *Arizona, supra; Malloy* v. *Hogan,* 378 U. S. 1 (1964). The state interest in the instant cases presumably is an interest in investigation and prosecution of those involved in alleged criminal activity. The decisions of this Court have made it clear that the state has the burden of proving such criminal activity, and cannot rely upon private citizens to do its work.

> However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness. *Miller* v. *United States,* 357 U. S. 301, 313 (1958); *See also, Mapp* v. *Ohio,* 367 U. S. 643 (1961).

This is emphasized again in *Escobedo* v. *Illinois,* 378 U. S. 478 (1946), where, in an opinion by Mr. Justice Goldberg, the Court stated:

> We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. . . . If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system. *Escobedo, supra,* at 490.

Such a "short-cut method" of law enforcement, resulting in a denial of First Amendment rights to individuals and the public in general, is being used here. The state, rather than using its own vast resources to investigate alleged criminal activity, is trying to use news reporting bodies as its investigative arms. This can only result in a restriction on the freedom of the press and a loss of individual rights of free speech. The state must be made "to shoulder the entire load," *Miranda, supra,* at 460, in its efforts to investigate and prosecute alleged criminal activities.

In addition, it is important to note that the grand jury investigations we are dealing with here were started only in response to the new stories written by the Petitioner. This standing alone is a strong indication of the vital service provided a community by a free and unhampered press. A news reporter, aided by the fact that he insured his "informants" that he would not reveal their names or any confidentially communi-

cated information, was able to report to the community as a whole a situation involving the use of drugs which was known only to a certain segment of that community. In so doing, the Petitioner was performing a vital function of the free press, a function which the First Amendment was created to protect.

Yet, by requiring the Petitioner to appear and to testify before a grand jury regarding his confidential information and sources of such information, gathered in his capacity as a reporter, the state is performing a severe disservice to the community as a whole, and to the policies served by freedom of press specifically.

As in any other case involving an abridgment of constitutional freedoms by governmental action, the government here bears the burden of demonstrating that the inroads it seeks to make into constitutionally protected rights are necessary under the circumstances involved. Before the government can make inroads upon freedom of the press or the freedom of speech, the reasons must be "extremely serious" and the degree of imminent danger "extremely high." *Bridges* v. *California*, 314 U. S. 252, 263 (1941).

Before a newsman may be required to appear before a closed session of a body having subpoena powers, an inquiry must be made in an open hearing to determine whether the necessary compelling need has been shown to justify infringement of the constitutional rights involved. An open forum must be provided to escape the indelible stigma of an appearance before a closed hearing, which is so destructive of patiently cultivated

confidences necessary to efficient newsgathering. The same type of hearing must be held if a newsman relies on his right to refuse to disclose confidential information or identify informants when subpoenaed to testify in a trial or upon deposition.

The requirement of an open hearing to determine the need for the appearance and testimony of a newsgatherer in such situations is of the utmost importance. Whether a reporter answers questions in a closed hearing regarding confidential information or the identity of his informants is unimportant if these informants suspect that he has given this testimony. The flow of information will cease. It is only by means of such an open hearing that the consequences of an appearance behind closed doors, and the suspicion that such an appearance breeds, can be avoided.

While each case must be judged on its own facts regarding the existence of a substantial state interest compelling the need for the testimony in question, and while there are no such facts presented in the instant cases, there are certain factors which the Petitioner would suggest as essential to a finding of compelling need. There well may be other relevant facts and circumstances for a court to consider, but Petitioner suggests that the three factors discussed below are absolutely essential to a constitutional ruling that a compelling need exists for the testimony in question.

The fact that a crime may have been committed is not enough to overcome the burden of showing compelling need. This Court has recognized that the fact that a substantive wrong has occurred does not neces-

sarily mean that a wrong is substantial, or that the danger to the state is imminent. *Bridges* v. *California, supra.* All substantive evils are not substantial evils, and *it is incumbent upon the state to demonstrate that the newsman's appearance and testimony is necessary to prevent direct, immediate and irreparable prospective damages to national security, human life or liberty.*

In order to demonstrate the requisite "compelling need," *DeGregory* v. *Attorney General, supra,* for the testimony of a newsgatherer, the state must show not only that the alleged criminal activity presents a direct, immediate and irreparable prospective threat of damage to national security, human life, or liberty, but it must also prove that the reporter has the information directly related to the alleged criminal activity, and that the state has no other means, less destructive of constitutional rights by which to obtain such information. *Sherbert* v. *Verner, supra.*

These factors are basic to a determination that the rights of a free press must be subordinated for the protection of the public welfare. Only where there is a direct, immediate and irreparable prospective threat to one right can another right be subverted. Where there is a threat to human life or national security there may be reason to infringe upon the rights protected by the First Amendment, if there is certainty that the abridgment will prevent the anticipated harm.

The nature of the state's interest in various criminal activities varies according to the nature of the crime involved. Society's need to protect itself is not present in the criminal activity alleged in the instant

cases. There is no threat of violence in the immediate future which justifies this state intrusion into the constitutionally protected areas of freedom of the press and freedom of speech. No life is being threatened. No overthrow of government is imminent. Without these elements, the state's interest in the testimony cannot justify the deprivation of constitutional rights which would result.

The requirement that the state prove that the reporter in question has the information related directly to the alleged criminal activity is clear. Without such a showing, state officials are in a position to constantly harass reporters who are responsible for "unpleasant news reports" and there is the temptation to use reporters as an arm of state law enforcement and in the process, destroy the functions the First Amendment was created to protect.

Despite the requisite proof, compelled testimony of this nature would still involve restrictions on the exercise of First Amendment rights. To prevent any unnecessary intrusions into this area by the state, the Petitioner suggests that the state should be required to show that it has no other means to obtain the information sought from the reporter. "[I]t would plainly be incumbent upon the (state) to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Sherbert* v. *Verner, supra,* at 407.[17]

[17]It should be emphasized that any such showing is in addition to and not in lieu of the other conditions set forth. The absence of alternative sources is not itself a sufficient basis for infringement of First Amendment rights.

Requiring that compelling need be shown is not such a complex problem as will constitute a unreasonable burden upon the courts. Knowledge that the availability of a reporter's information is so limited will discourage many attempts to gain such information.

IV. THE STATE HAS MADE NO DEMONSTRATION OF ANY NEED FOR THE INFORMATION ALLEGEDLY POSSESSED BY THE PETITIONER.

Attention must now be turned to the facts of the particular cases here involved to determine whether the State has met any burden in demonstrating that conditions existed under which the First Amendment rights involved should be subordinated to a higher interest of the State. The record shows that in neither of these two cases was any attempt made by the State to prove the presence of any compelling and overriding need for the Petitioner's testimony or appearance. As indicated by the Kentucky Court of Appeals, Petitioner was found to be in a position no different from that of any other grand jury witness.

In the *Hayes* case the Petitioner was brought before the court after refusing to disclose to the grand jury confidentially received information. After hearing arguments concerning the applicable law, the court directed the Petitioner to answer the questions posed by the grand jury. No evidence whatsoever was presented to show any extraordinary need or interest in obtaining the testimony of the Petitioner; in fact, no such effort was made. Apparently, the sole basis for believing the Petitioner was possessed of any informa-

tion concerning the illegal use and possession of marijuana or hashish was the newspaper article itself. There was no indication that the grand jury was possessed of any other information which might lead it to subpoena the Petitioner. Not only was there no burden on the state to show some need for Petitioner's testimony, there was no recognition of any First Amendment protections whatsoever.

In the *Meigs* case, no evidence was required or produced to show any unusual, extraordinary or compelling need for the Petitioner's attendance at the secret grand jury session. Judge Meigs saw nothing in the First Amendment which would afford a reporter any protection from appearing and testifying before the grand jury. After a very brief hearing on the Petitioner's motion to quash the subpoena, the Petitioner was ordered to appear before the secret session of the grand jury. Once again, the only apparent reason the grand jury had to believe the Petitioner possessed information of interest was the news stories themselves. No effort was made by the State, or required of it, to show any compelling or other need for the Petitioner's appearance before the grand jury.

The Kentucky Court of Appeals refused to grant Petitioner the relief he requested in either of the two cases, and specifically refused to recognize that any First Amendment protections extended to Petitioner in the situations here involved. The Kentucky Court of Appeals further held that even if there were First Amendment rights involved, the Petitioner failed to show that he would be harmed by appearance before

the grand jury. Thus, the Kentucky Court of Appeals has taken the unique position of requiring an individual to prove that he will be damaged when constitutional protections extending to him are abridged, rather than requiring the state to overwhelmingly justify disregarding the First Amendment's protective shield.

Recognizing that the rights guaranteed to the press are no less important than the rights guaranteed by other sections of the Constitution, the same protection must be afforded when an attempt is made to set these rights aside in the name of the state. As in any other case, the state bears a heavy burden of proof before the free function of the press may be compromised. In these cases the State has made no attempt to meet its burden of proof. Astonishingly, the Kentucky Court of Appeals has decreed that the burden is on the Petitioner to prove that he will be damaged by the abridgment of his constitutional rights.

Where the state has failed to sustain its burden of proving a direct, immediate prospective threat of irreparable damage to life, liberty or the national security, neither the Petitioner nor any other news reporter can be required to appear before a grand jury or to disclose his confidential information. These particular cases are not ones where society has an overriding need to protect itself. There was no threat of violence in the immediate future in either of these cases which justified the State's intrusion into constitutionally protected areas. Neither life nor liberty was threatened. Certainly the national security was not at stake. Without these elements, the State's interest

cannot justify the deprivation of the constitutional rights posed.

In each of these two cases the State seeks to capitalize on information gained by the Petitioner only because the Petitioner was able to promise that the names of certain persons supplying that information would not be disclosed. Thus, the State has engaged in a futile, self-defeating exercise which can only result in the loss of many valuable sources of news which are vital necessities in the effort to fully inform the public. These cases present no difficult problems in determining whether or not the State has met its burden of proving its compelling need. No proof whatsoever was offered. Whether the test to be applied is that suggested by the Petitioner, or some other, the decisions of the Kentucky Court of Appeals cannot stand because they have required no burden at all. Only if the Petitioner, as a newsman, had no protection whatsoever under the First Amendment when he was subpoenaed by a grand jury can the decisions here in question be upheld.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgments of the court below should be reversed.

Respectfully submitted,

EDGAR A. ZINGMAN
ROBERT C. EWALD
JON L. FLEISCHAKER
WYATT, GRAFTON & SLOSS
300 Marion E. Taylor Building
Louisville, Kentucky 40202

Counsel for Petitioner

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IN THE

Supreme Court Of The United States

October Term, 1970

No. 1381

70-85

PAUL M. BRANZBURG - - - Petitioner

versus

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division - - - - Respondent

and

PAUL M. BRANZBURG - - - Petitioner

versus

HENRY MEIGS, Judge, Franklin Circuit Court - - - Respondent

RESPONSE TO MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

EDWIN A. SCHROERING, JR.
COMMONWEALTH'S ATTORNEY

W. C. FISHER, JR.
ASSISTANT COMMONWEALTH'S ATTORNEY
Courthouse Annex
Louisville, Kentucky 40202

Counsel for Respondent, John P. Hayes, Judge, Jefferson Circuit Court, Criminal Branch, Second Division

LAWYERS PRINTING COMPANY, LOUISVILLE, KY.

IN THE

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and

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vs.

HENRY MEIGS, Judge, Franklin Circuit Court - - - *Respondent*

RESPONSE TO MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Comes the respondent, John P. Hayes, Judge, by counsel and hereby objects to the Motion of American Newspaper Publishers Association for Leave to File Brief Amicus Curiae for the following reasons:

1. Counsel for the respondent heretofore has refused to give written consent to American Newspaper

Publishers Association for leave to file a brief as amicus curiae and has consistently refused to give written consent to numerous other requests.

2. There have been many and various persons and corporations expressing interest in the questions to be decided by the court since certiorari has been granted by this honorable court. No less than six (6) separate requests have been made for consent to file amicus curiae briefs. Consent given to one would merely open the door to numerous briefs of the same nature being filed, thus creating an unnecessary burden on the Court and the undersigned. Since the persons who contacted the undersigned are all persons of the news media or the American Civil Liberties Union and whose position in this matter is obviously antagonistic to that of the respondent herein, it is the position of the respondent that there is no reason to believe that counsel for the petitioner cannot present all questions of law and pertinent arguments thereon to this honorable court for just disposition.

3. Counsel for American Newspaper Publishers Association has not set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and the relevancy to the disposition of the case as is required by Rule 42 of the Revised Rules of the Supreme Court of the United States.

It is respectfully requested that the court permit this response to suffice for all subsequent motions for

leave to file amicus curiae briefs for the reasons set out herein.

Respectfully submitted

EDWIN A. SCHROERING, JR.
Commonwealth's Attorney

W. C. FISHER, JR.
Assistant Commonwealth's Attorney

Courthouse Annex
Louisville, Kentucky 40202

Counsel for Respondent

Dated: July 12, 1971

PROOF OF SERVICE

I, W. C. Fisher, Jr., one of counsel for respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 15th day of July, 1971, I served a copy of the foregoing brief on Arthur B. Hanson, 888 17th Street, N. W., Washington, D. C. 20006, counsel for American Newspaper Publishers Association, and Edgar A. Zingman, 300 Marion E. Taylor Building, Louisville, Kentucky 40202, counsel for petitioner, by mailing a copy in a duly addressed envelope with first class postage prepaid to said counsel at the above address.

W. C. Fisher, Jr.

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SEP 13 1971

E. ROBERT SEAVER, CL

Nos. 70-85 and 70-94

In the Supreme Court of the United States

OCTOBER TERM, 1971

PAUL M. BRANZBURG, PETITIONER

v.

JOHN P. HAYES, JUDGE, AND HENRY MEIGS, JUDGE

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE COMMONWEALTH OF KENTUCKY

IN THE MATTER OF PAUL PAPPAS, PETITIONER

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
WM. BRADFORD REYNOLDS,
Assistant to the Solicitor General,
BEATRICE ROSENBERG,
ROBERT E. LINDSAY,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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PAUL M. BRANZBURG, PETITIONER

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JOHN P. HAYES, JUDGE, AND HENRY MEIGS, JUDGE

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE COMMONWEALTH OF KENTUCKY

No. 70–94

IN THE MATTER OF PAUL PAPPAS, PETITIONER

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

THE INTEREST OF THE UNITED STATES

In *United States* v. *Caldwell*, No. 70–57, the United States brought before this Court the narrow question whether, assuming that a newspaper reporter is privileged to withhold information from a grand jury which he obtained confidentially in the process of newsgathering, the privilege would extend so far as to bar a grand jury, in the absence of a preliminary showing of particularized need, from calling the

reporter to testify about matters not received in confidence, when the reporter, in published articles, has set forth information of obvious interest to the grand jury. It is our position there that, whatever may be the nature and scope of the newsman's privilege, it does not render a reporter immune from the necessity of at least appearing before a grand jury in response to a subpoena *ad testificandum* which has been limited by court order to matters that are of a non-confidential nature.

These cases present broader questions. In *Pappas*, where petitioner was allowed to visit the headquarters of the Black Panthers on the promise that he would not disclose what he heard or saw unless there was a police raid, the question presented is whether, in the absence of a statute, a reporter has a privilege to withhold from a grand jury investigating criminal acts information as to what he saw and heard during his visit. In *Branzburg*, where the reporter described and photographed the commission of a crime—the production of hashish—the constitutional question[1] is

[1] In the proceedings below, petitioner Branzburg also relied upon a Kentucky statute (Ky. Rev. Stat. 421.100 (1969)), which extends to newsmen a privilege of non-disclosure as to the source of any published information.

The statute provides: "No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected."

whether a reporter has a First Amendment privilege to withhold from a grand jury facts ascertained from his personal observation of the crime.

Whether a reporter's privilege is implicit in the First Amendment guarantee of a free press, and, if so, the scope of such privilege, are matters which concern the United States as well as the states. While, as a matter of policy, the Attorney General has issued guidelines designed to minimize friction between the prosecution and the news media,[2] it is important for the Executive and the Congress to know the extent of their responsibilities under the Constitution in this field. It is our basic position that the question whether there should be a reporter's privilege, and the extent of such privilege, is for Congress rather than for the courts, and that it is to the legislature, rather than to this Court, that the news media should address their arguments.

SUMMARY OF ARGUMENT

The claim of privilege by reporters and journalists is not new. It has been advanced repeatedly in the courts, in Congress, in state legislatures and before various rulemaking committees. It has been analogized to the traditional privileges at common law, proposed as a rule of evidence, and urged as a constitutional right implicit in the First Amendment guarantee of a free press. With minor exception—most notably in the area of state legislation—the efforts have been to no avail.

[2] The Attorney General's Guidelines are set forth in an appendix to our brief on the merits in *United States* v. *Caldwell*, No. 70–57, this Term, at pp. 49–51.

The news media have functioned effectively and efficiently in this country for almost two hundred years without a reporter's privilege. Since the early days of the Republic, the newsgathering process has depended in large part on information given to reporters in confidence. Despite the fact that anonymous informants have always been faced with the possibility that some day before some grand jury investigating criminal activity the reporter might be called upon to divulge his sources, the flow of confidential information to the media has increased significantly over the years.

Obviously, the vast majority of such information is unrelated to the fact that news reporters may be called upon to tell what they know about criminal acts. The area of potential clash between law enforcement agencies and the claimed reporter's privilege is a narrow one, confined largely to situations where newsmen have witnessed or may have witnessed events bearing on the commission of a crime. Recognition of a privilege in this area raises far-reaching questions of policy which cannot be adequately answered by such broad phrases as "the right to gather news." The reporters are claiming, not merely the right to gather news, but the right to withhold news on the basis of promises that they, in their sole discretion, make to their informants. This is not so clearly desirable nor so clearly necessary to effective news reporting that the Court should recognize the position of the news media as a matter of constitutional right.

The Attorney General and most states have recognized that this is a delicate area and that it is desirable to interfere as little as possible with the newsgather-

ing activities of the news media. This, however, is different from according to the news media a privilege under the Constitution to be free of the duty imposed on all citizens to give testimony relating to a crime. The past two hundred years demonstrate convincingly that such a privilege is not essential to a meaningful exercise of the protected freedoms of the press to write, to publish, and to circulate the news. Whether or not it is desirable is a different question altogether. But, the desirability of according a privilege to news reporters and the scope of such a privilege are matters that should be left to the legislative process; it is, therefore, to the legislature, rather than to this Court, that the news media should address their arguments.

ARGUMENT

WHETHER OR NOT THE PROTECTION OF A NEWSMAN'S CONFIDENTIAL ASSOCIATIONS IS DESIRABLE AS A MATTER OF POLICY, THERE IS NO REPORTER'S PRIVILEGE AS A MATTER OF FIRST AMENDMENT RIGHT

1. The question before the Court in these cases is not, as the briefs of the petitioners and of the news media seem to assume, whether it is desirable for news reporters to have the privilege of withholding from grand juries and law enforcement authorities information which the reporters believe was received in confidence, even if such information relates to the commission of a crime. The issue presented here is a very different one: whether recognition of such a privilege is so essential to the existence of a free press that newsmen must be deemed to have that privilege as of right under the First Amendment. Unless that

is so, questions relating to a claimed reporter's privilege are not issues for the courts, but for the legislative process.

Despite the efforts of respected news reporters, in the affidavits carefully prepared for the *Caldwell* case, to suggest that failure to recognize their claimed privilege as implicit in the First Amendment will result in the demise of a free press, the fact remains that the newsgathering process has functioned effectively and efficiently in this country for almost two hundred years without benefit of the special protections sought in these cases. It has, of course, long been recognized that many newsworthy stories would never have reached the public if the sources had been unable to rely on anonymity. Almost forty years ago, this point was made as forcefully as it is today (Siebert and Ryniker, *Editor and Publisher*, September 1, 1934, pp. 36–37):

> News channels which prove valuable in unearthing such examples of public scandals remain so only as long as the source remains secret. Honest officials, and occasionally dishonest persons, who can furnish necessary information cannot afford to jeopardize their freedom or their jobs by permitting their names to be used. * * * No information would be given if the informant did not have faith in the integrity of the reporter in the matter of withholding his name. The newspaper man would find his channels of news closed.

But, notwithstanding the Ninth Circuit's recent decision in *Caldwell*, the possibility that some day before some grand jury investigating criminal activ-

ity the reporter might be called upon to divulge his source of information—a possibility that has existed since the early days of the Republic—has apparently not in the past deterred the anonymous informant from communicating with the news media. As revealed by a 1968 study of all major newspapers in the United States, an "absolutely staggering" number of news stories are developed from information given to reporters in confidence. Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U. L. Rev. 18, 43–44, 60 (1969).

2. Obviously, news reporters obtain all sorts of confidential information, from personal gossip to opinions on affairs of state, which will not be affected by the fact that they may be called upon to tell what they know about criminal acts. The area of potential clash between law enforcement agencies and the claimed reporter's privilege is, therefore, a narrow one. It is largely confined, as the cases presently before this Court illustrate, to situations where reporters have witnessed or may have witnessed events which have a bearing on the commission of a crime. Recognition of a privilege in this area raises far-reaching questions of policy, which cannot be adequately answered by the broad generalizations offered by the media.

For example, is a press really free when it deliberately sets out to publicize a crime but refuses to disclose the criminal, as in the Kentucky case? Misprision of a felony is a crime of long standing. See generally 1 Stat. 112, 113; 15A C.J.S. §§ 2(2)–3. Without undertaking to decide whether a reporter who witnesses the crime is guilty of an affirmative act of

misprision by refusing to disclose identities, it is clear that his act is violative of the basic principle sustaining that offense—that the state is entitled to the testimony of all men with knowledge of facts disclosing crime. Cf. *Brown* v. *Walker*, 161 U.S. 591, 600. In the area of relationships with minority and dissident groups, there are also some basic questions which must be considered. Is a press really free when, as in the Massachusetts case, the minority group has it in its power to decide what the public will or will not be told by the conditions it imposes on permitting a reporter access to its headquarters? Is it more important that the press maintain a thread of relationships to such groups by acceding to their conditions, reasonable or unreasonable, or is it more important that the press report what they can manage to find out, untrammeled by the conditions imposed by their informants?

We raise the questions, not to answer them, but to suggest that the question whether there should be a reporter's privilege, and what its scope should be, is not a simple issue capable of resolution by such broad phrases as "the right to gather news." The reporters are claiming, not merely the right to gather news, but the right to withhold news on the basis of promises that they, in their sole discretion, make to their informants.[3] This, we submit, is not so clearly desirable nor so clearly necessary to effective news reporting

[3] Petitioners and the news media liken the reporter's privilege to the privilege of the government informer. See *Roviaro* v. *United States*, 353 U.S. 53, 59; *McCray* v. *Illinois*, 386 U.S. 300. As this Court stated in *Roviaro* (353 U.S. at 59), however, the informer's privilege "recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity,

that the Court should recognize the position of the news media as a matter of constitutional right.

The only privilege reognized by the Constitution is the privilege against self-incrimination (Fifth Amendment). Whether other privileges should exist is a matter to be decided by regular legislative means on the basis of the normal debate and full consideration of competing values that regularly enter into legislation. Some states have enacted statutes governing the newsman's privilege, only a few of them as broad as the privilege claimed in these cases.[4] If the present-day circumstances justify recognition of a privilege of broader scope and of nation-wide coverage, that determination ought to be made by Congress. That body is better suited to the task of developing the scope and

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encourages them to perform that obligation." By contrast, the claimed reporter's privilege is designed to permit newsmen to withhold from law-enforcement officials their knowledge of criminal activity, and thus has precisely the opposite effect from the privilege accorded to government informers.

[4] Such legislation has been passed in seventeen states: Ala. Code Recompiled Tit. 7, § 370 (1960); Alaska Stat. § 09.25.150 (1967, 1970 Cum. Supp.); Ariz. Rev. Stat. Ann. § 12-2237 (1969 Supp.); Ark. Stat. Ann. § 43-917 (1964); Cal. Evid. Code Ann. § 1070 (West 1966); Ind. Ann. Stat. § 2-1733 (1968); Ky. Rev. Stat. § 421.100 (1969); La. Rev. Stat. § 45:1451-54 (1970 Cum. Supp.); Md. Ann. Code Art. 35, § 2 (1971); Mich. Stat. Ann. § 28.945(1) (1954); Mont. Rev. Codes Ann. Tit. 93), ch. 601-2 (1964); Nev. Rev. Stat. § 48.087 (1969); N.J. Stat. Ann. Tit. 2A, ch. 84A, § 21, 29 (Supp. 1969); N.M. Stat. Ann. § 20-1-12.1 (1953, 1967 Rev.); N.Y. Civ. Rights Law § 79-h (McKinney 1970); Ohio Rev. Code Ann. § 2739.12 (1953); Pa. Stat. Ann. Tit. 28, § 330 (1958, 1970 Cum. Supp.). For a discussion of the differences in the scope of coverage under these statutes, see Comment. *Constitutional Protection for the Newsman's Work Product*, 6 Harv. Civ. R.-Civ. Lib. L. Rev. 119, 121-122 (1970).

limitations of such a privilege in a systematic way than are the courts as a function of interpreting the Constitution.

3. At the time that the Founding Fathers drafted the Bill of Rights, the common law recognized no privilege on the part of a news reporter to conceal his source of information or to withhold information received by him in confidence. 8 Wigmore, *Evidence* § 2286 (McNaughton Rev. 1961). Prior to the decision of the Ninth Circuit in *Caldwell*, courts in this country which have been called upon to recognize such a privilege have, with minor exception,[5] consistently refused to do so. See, *e.g.*, *Garland* v. *Torre*, 259 F. 2d 545 (C.A. 2), certiorari denied, 358 U.S. 910; *Rosenberg* v. *Carroll*, 99 F. Supp. 629 (S.D.N.Y.); *Brewster* v. *Boston Herald-Traveler Corp.*, 20 F.R.D. 416 (D. Mass.); *In re Goodfader's Appeal*, 45 Hawaii 317, 367 P. 2d 472; *People ex rel. Mooney* v. *Sheriff of* New York County, 269 N.Y. 291, 199 N.E. 415.[6] Quite apart from any question as to the aptness of the analogy of the claimed reporter's privilege to the traditional privileges existing for certain personal relationships (*i.e.*, attorney-client, husband-wife, etc.),[7]

[5] See, *e.g.*, *In re Nat Caldwell* (unreported opinion of Tennessee Criminal Court), New York Law Revision Commission, Report, 85–86 (1949); *Aliota* v. *Cowles Communications, Inc.*, N.D. Calif., C.A. 52150, decided December 4, 1969; *People* v. *Dohrn*, Cook County Cir. Ct., Crim. No. 69–3808, decided May 20, 1970.

[6] For a collection of cases dealing with the refusal of a newsman to disclose, see Annot. 7 A.L.R. 3d 591 (1966). See also New York Law Revision Commission, Report, *supra*, at 59–96.

[7] For a discussion concluding that such analogies are imperfect, see Note, *The Newsman's Privilege: Protection of Confidential Associations and Private Communications*, 4 J.L. Reform

the fundamental rationale underlying these decisions seems to be a disinclination to limit the duty imposed upon all to attend and give their testimony in a court of law by expanding the class of persons entitled to withhold evidence on the basis of some privilege.[8] See, *Garland* v. *Torre, supra,* 259 F. 2d at 550; *In re Goodfader's Appeal, supra,* 45 Hawaii at 333–335, 367 P. 2d at 482–483. As then Judge Stewart stated in *Garland* v. *Torre, supra,* 259 F. 2d at 550:

> The privilege not to disclose relevant evidence obviously constitutes an extraordinary exception to the general duty to testify. Even those few situations to which the law has long accorded this privilege have been seriously questioned. It has been emphasized that the tendency should be "not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege." * * * To recognize the privilege asserted here, assuming our power to do so, would poorly serve the cause of justice.

It is only recently that the First Amendment has been offered as a basis for the refusal by newsmen to testify. The decisions in this area appear to go three

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85, 89–93 (1970). Compare Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U. L. Rev. 18, 26–27 (1969). And see n. 3, *supra*.

[8] Disinclination to expand privileges of non-disclosure, even those previously recognized, has been voiced by various commentators. See, *e.g.*, 8 Wigmore, *Evidence* § 2192 at 73, § 2286 at 536 (McNaughton Rev. 1961); Morgan, Foreword, Model Code of Evidence, 22–30 (1942); 2 Chafee, *Government and Mass Communications*, 495–499 (1947); Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information*, 36 Vir. L. Rev. 61, 83 (1950).

ways. There are cases which totally reject the claim that the First Amendment prohibits compelling a reporter to disclose a confidential source or information received in confidence. See, *e.g.*, *In re Taylor*, 412 Pa. 32, 193 A. 2d 181; *State* v. *Buchanan*, 250 Ore. 244, 436 P. 2d 729, certiorari denied, 392 U.S. 905. Second, there are a group of cases which assume, without so deciding, that disclosure in some circumstances might constitute an infringement of First Amendment rights, but find no First Amendment violation because the interest in disclosure, in the circumstances presented, outweighs any possible impingement on freedom of the press. *Garland* v. *Torre*, 259 F. 2d 545 (C.A. 2), certiorari denied, 858 U.S. 910; see also *State* v. *Knops*, 49 Wis. 2d 647, 183 N.W. 2d 93.[9] Only a few very recent decisions actually decide that compulsory disclosure invariably trenches on the First Amendment freedom of the press and require that a special showing be made to justify disclosure. See *United States* v. *Caldwell*, 434 F. 2d 1081 (C.A. 9), pending on certiorari, No. 70–57, this Term; and see cases cited at n. 5, *supra*. There thus is certainly no general recognition of an overriding need for the claimed reporter's privilege in order for the media to continue providing the public—as they have for almost two centuries—with "the widest possible dissemination of information from diverse and antagonistic sources" (*Associated Press* v. *United States*, 326 U.S. 1, 20).

[9] The *Knops* decision is reprinted in our Supplemental Memorandum to the petition for certiorari in *United States* v. *Caldwell*, No. 70–57, this Term, certiorari granted, May 3, 1971.

4. That the absence of a privilege has not rendered the press ineffective in gathering news is evidenced by its inability yet to convince Congress or a number of state legislatures that the reporter's privilege is essential to a free press in a free society.[10] Although bills creating such a privilege have been proposed on several occasions, none has ever emerged from committee.[11] There is presently pending before the Judiciary Committee another bill which provides protection of the newsman's confidential sources and communications. See S. 1311, 92d Cong., 1st Sess. (1970). In addition, the Committee on Rules of Evidence is in the process of formulating evidentiary rules for

[10] Indeed, on several occasions Congress has, even in the face of an apparent claim of privilege, cited newsmen for contempt for refusing to answer questions before a congressional investigating committee. Thus, in 1857, the House of Representatives appointed a committee to investigate published charges to the effect that members of the House were accepting bribes. A newspaper correspondent, J. W. Simonton, appeared before the committee and refused to disclose names of members whom he claimed had approached him, inquiring whether, through him, they could procure money for their votes on certain bills. His refusal was based on the ground that a disclosure would violate a confidence. See Cong. Globe, 34th Cong., 3d Sess. 274–275, 277, 404, 411–413 (1857). For a complete report of the proceedings in this matter, see S. Misc. Doc. No. 278, 53d Cong., 2d Sess. 85–190 (1894). For a similar case in the Senate, see *id.* at 311–504 (1894).

[11] See, *e.g.*, S. 1851, 88th Cong., 1st Sess. (1963); H.R. 8519, 88th Cong., 1st Sess. (1963); H.R. 7787, 88th Cong., 1st Sess. (1963). See New York Law Revision Commission, Report, *supra*, at 88–95 (1949), for a listing of bills introduced in the 71st, 72d, 74th, 75th, 76th and 78th Sessions of Congress.

the federal courts.[12] It is in such a forum, or in Congress, that the value judgments relating to recognition of a newsman's privilege should be debated and resolved.

The Attorney General and a number of states have recognized that this is a delicate area, and that it is desirable to interfere as little as possible with the news-gathering activities of the media (see nn. 2, 4, *supra*). This, however, is different from according to the news media a privilege under the Constitution to be free of the duty imposed on all citizens to give testimony relating to a crime. The past two hundred years illustrate convincingly that such a privilege is not necessary to a meaningful exercise of the protected freedoms of the press to write,[13] to publish[14] and to circulate[15] the news. As Justice Holmes said, speaking of a related type of constitutional problem, in *Otis Co.* v. *Ludlow Manufacturing Co.*, 201 U.S. 140, 154:

> We are bound to be very cautious in coming to the conclusion that the Fourteenth Amendment

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[12] As of now the Proposed Rules of Evidence for the United States District Courts and Magistrates (46 F.R.D. 161) not only do not provide a newsman's privilege but sharply limit the number of personal-relationship privileges—even excluding a general physician-patient privilege. 46 F.R.D. 161, 249–269 (Rules 5–03 to 5–06).

[13] See, *e.g.*, *New York Times* v. *Sullivan*, 376 U.S. 254; *Time, Inc.* v. *Hill*, 385 U.S. 374; *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81.

[14] See, *e.g.*, *New York Times Company* v. *United States* and *United States* v. *The Washington Post Company*, Nos. 1873 and 1885, October Term, 1970 decided June 30, 1971.

[15] See, *e.g.*, *Winters* v. *United States*, 333 U.S. 507, 510; *Lovell* v. *Griffin*, 303 U.S. 444; *Grosjean* v. *American Press Co.*, 297 U.S. 233; *Near* v. *Minnesota*, 283 U.S. 697.

has upset what thus has been established and accepted for a long time.

Whether or not such a privilege is desirable is, as stated at the outset, a different question altogether. The desirability of according a privilege to news reporters and the scope of such a privilege are matters, we submit, that should be left to the legislative process.

CONCLUSION

For the reasons stated, the judgments of the Court of Appeals for the Commonwealth of Kentucky in No. 70–85 and the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts in No. 70–94 should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

WM. BRADFORD REYNOLDS,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
ROBERT E. LINDSAY,
Attorneys.

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No. 70-85

IN THE

Supreme Court Of The United States

October Term, 1971

PAUL M. BRANZBURG, PETITIONER

v.

JOHN P. HAYES, JUDGE

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE COMMONWEALTH OF KENTUCKY

BRIEF FOR THE RESPONDENT, JOHN P. HAYES, JUDGE

EDWIN A. SCHROERING, JR.
Commonwealth's Attorney

W. C. FISHER, JR.
Assistant Commonwealth's Attorney

Counsel for Respondent

Jefferson County Courthouse Annex
Louisville, Kentucky 40202

LAWYERS PRINTING COMPANY, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

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PAUL M. BRANZBURG, PETITIONER

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE COMMONWEALTH OF KENTUCKY

BRIEF FOR THE RESPONDENT, JOHN P. HAYES, JUDGE

SUMMARY OF ARGUMENT

Petitioner, a newspaper reporter, refused to answer questions propounded before a Grand Jury of Jefferson County, Kentucky, claiming a privilege not to answer pursuant to the provisions of Kentucky Revised Statutes, Sec. 421.100. The Statute provides that a newpaper reporter "shall not be compelled to disclose . . . the source of any information procured or obtained by him." The questions asked Petitioner related to his witnessing an alleged violation of the narcotic laws of the Commonwealth of Kentucky, KRS Chap. 218.

Petitioner had witnessed the possession and compounding of narcotic drugs by persons he admittedly can name and identify. He wrote a newspaper story about what he witnessed and had a photographer take pictures of the law violation to convince any doubters of the truth of what he witnessed and wrote. The trial Court and the Court of Appeals of Kentucky ruled Petitioner should answer the questions.

ARGUMENT

COMPELLING JOURNALIST WHO WITNESSED A CRIME TO TESTIFY DOES NOT VIOLATE THE FIRST AMENDMENT SINCE THERE IS NO REPORTER'S PRIVILEGE AS A MATTER OF RIGHT.

The First Amendment of the United States Constitution, applicable to the States by the 14th Amendment, says "Congress shall make no law . . . abridging the freedom of speech or the press." Sec. 8 of the Constitution of Kentucky also provides for freedom of speech and press. The highest court of Kentucky has said the provision means that the press has "the same rights and immunities that are enjoyed by the public at large . . . but no more." Riley v. Lee, 88 Ky. 603, 11 S.W. 713 (1889).

A confidential communication between a journalist and an informant was not privileged from disclosure at common law. No pledge of privacy nor oath of secrecy can avail against a demand for the truth in a court of justice. 8 Wigmore, Evidence Sec. 2286. (McNaughton Rev. 1961.) The only privilege rec-

ognized by the Constitution of the United States is the privilege against self-incrimination. (Fifth Amendment.)

The Commonwealth of Kentucky recognized that there was no reporter's privilege from disclosing confidential communications and enacted KRS 421.100 thereby establishing a new privilege.

> "421.100 (1649d-1) Newspaper, radio or television broadcasting station personnel need not disclose source of information.
>
> "No person shall be compelled to disclose in any legal proceedings or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected. (1952 c 121. Eff. 6-19-52)"

The Commonwealth of Kentucky has made no law abridging freedom of the press in violation of the First Amendment of the Constitution of the United States. On the contrary, it has implemented and extended the freedom of the press by the enactment of KRS 421.100.

The Court below told Petitioner he need not reveal under KRS 421.100, supra, the source of his informa-

tion, but that what he actually witnessed he must reveal the same as any other citizen who witnesses the commission of a crime. Compelling Petitioner to testify *as a witness* to the commission of a crime he saw, had photographed and wrote about in his employers' newspaper, in no way violates his rights under the First Amendment of the Constitution of the United States.

CONCLUSION

For the reason stated the Judgment of the Court of Appeals for the Commonwealth of Kentucky in No. 70-85 should be affirmed inasmuch as there has been no showing of a violation of a First Amendment right.

EDWIN A. SCHROERING, JR.
Commonwealth's Attorney

W. C. FISHER, JR.
Assistant Commonwealth's Attorney

Courthouse Annex
Louisville, Kentucky 40202

Counsel for Respondent, John P. Hayes, Judge

Dated: September 23, 1971

No. 70-85

Brief, amicus curiae, for American Newspaper Publishers Assoc. filed Oct. 12, 1971. Vide: 70-57 and 70-94. ~~See 70-57.~~

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 70-85

PAUL M. BRANZBURG - - - - - Petitioner

versus

JOHN P. HAYES, JUDGE, Jefferson Circuit Court, Criminal Branch, Second Division - - - - - Respondent

AND

PAUL M. BRANZBURG - - - - - Petitioner

versus

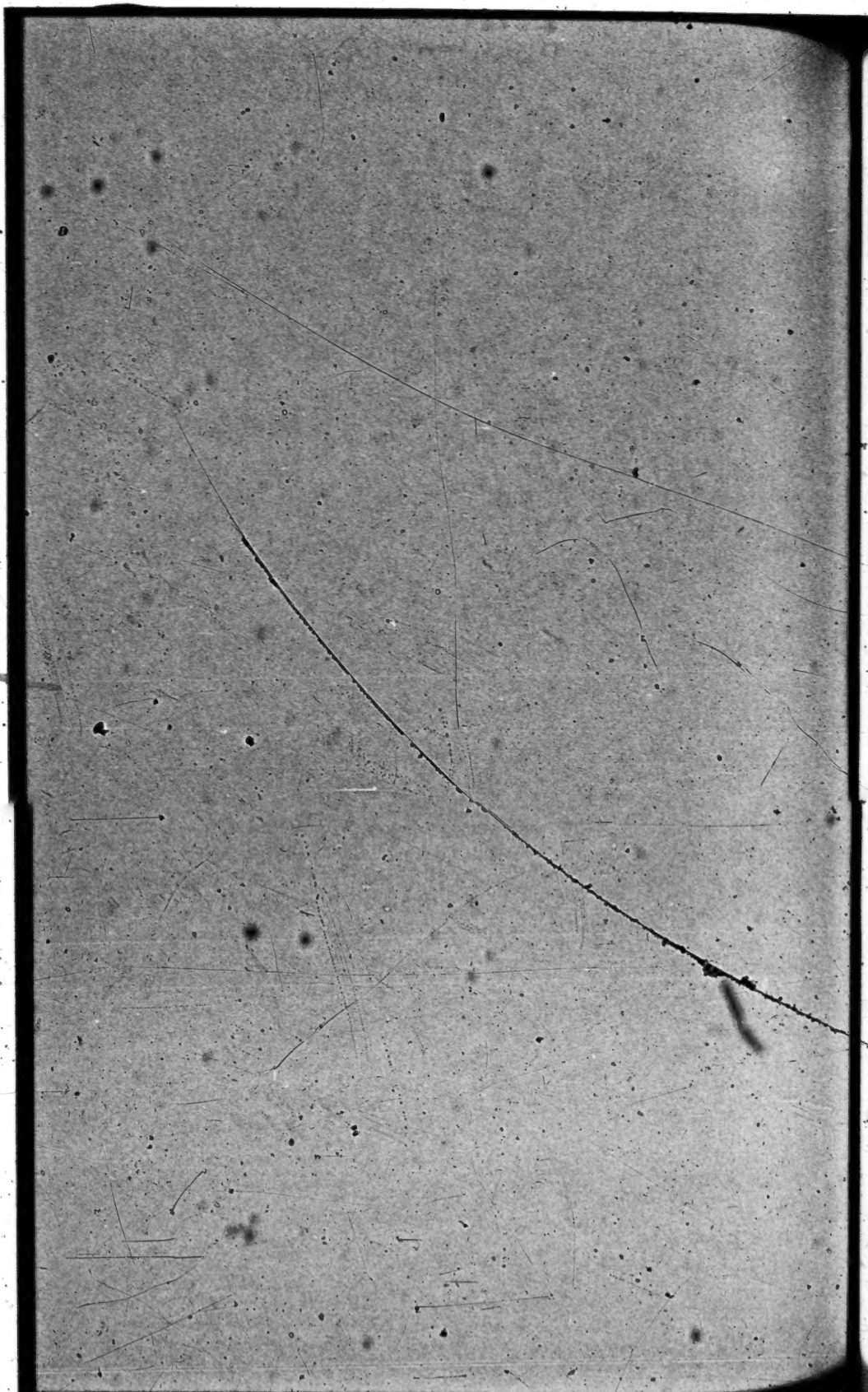
HENRY MEIGS, Judge, Franklin Circuit Court - - - - - - - Respondent

On Writ of Certiorari to the Kentucky Court of Appeals

REPLY BRIEF FOR PETITIONER, PAUL M. BRANZBURG

EDGAR A. ZINGMAN
ROBERT C. EWALD
JON L. FLEISCHAKER
WYATT, GRAFTON & SLOSS
300 Marion E. Taylor Building
Louisville, Kentucky 40202
Counsel for Petitioner

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.



IN THE

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October Term, 1971

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PAUL M. BRANZBURG - - - - *Petitioner*

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v.

HENRY MEIGS, Judge, Franklin Circuit Court - - - - *Respondent*

ON WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

REPLY BRIEF FOR PETITIONER, PAUL M. BRANZBURG

I

The Amicus Brief of the United States suggests that the Petitioner is guilty of misprision of a felony by failing to disclose knowledge of an alleged crime.

(p. 7). This statement indicates so basic a misunderstanding of the law that this reply is necessary.

Misprision of a felony, as defined by the authorities cited by the United States, is "a criminal neglect either to prevent a felony from being committed or to bring the offender to justice after commission. . . ." 15A C.J.S., *Compounding Offenses,* § 2(2). Generally, something more than mere silence is necessary for one having knowledge of a felony to be guilty of the criminal neglect necessary for misprision. For example, under the federal statute cited by the United States, 1 Stat. 112, 18 U.S.C. §4, an essential element of the crime is that the defendant take some affirmative act to conceal the crime of the principal. *Lancey* v. *United States,* 356 F. 2d 407 (9th Cir. 1966), *cert. denied,* 385 U. S. 922; *Neal* v. *United States,* 73 F. 2d 795 (10th Cir. 1934); *United States* v. *Farrar,* 48 F. 2d 515 (D. Mass. 1930), *affirmed* 281 U. S. 624.

Nor is failure to report knowledge of a crime a violation of Kentucky law. The conduct of a person in failing to give warning of a crime threatened may be reprehensible but he is under no legal duty to prevent it. *Elmendorf* v. *Commonwealth,* 171 Ky. 410, 188 S. W. 483 (1916). "The mere knowledge that a crime has been committed and failure to tell of it does not make one an accessory after the fact." *Elmendorf* v. *Commonwealth, supra,* at 489.

Contrary to the government's assertion, the petitioner had no duty to disclose his knowledge of any criminal acts. Any argument based on this fundamental misunderstanding of the law must fail.

II

In addition, the Amicus Brief states that "it is important for the Executive and the Congress to know the extent of their responsibilities under the Constitution in this field" (p. 3). The Amicus then proceeds to argue that the question as to whether there should be a reporter's privilege and the extent of that privilege is for Congress to decide rather than the courts.

This position taken by the United States is difficult to understand. That it is the responsibility of the courts to interpret the Constitution needs no citation of authority, and it is clear that in the instant case the issues involved are issues arising under the Constitution of the United States. Furthermore, if it is important for the Executive and the Congress to know the extent of their limitations under the Constitution in this area, as the Amicus argues, then it is for this Court to decide those constitutional limitations, not the Congress or any other legislative body.

III

The Amicus Brief of the United States makes another interesting observation.

> The area of potential clash between law enforcement agencies and the claimed reporter's privilege is, therefore, a narrow one. It is largely confined, as the cases presently before this Court illustrate, to situations where reporters have witnessed or may have witnessed events which have a bearing on the commission of a crime (p. 7).

This observation, considered together with the fact that the primary purpose served by the First Amendment, "the widest possible dissemination of information from diverse and antagonistic sources . . ." *Associated Press* v. *United States,* 326 U. S. 1, 20 (1945), will be seriously endangered if the asserted reporter's privilege is not recognized, compels the conclusion that there is little to gain but much to lose if a reporter's First Amendment privilege not to divulge confidential information is not recognized by this Court. The need of the grand jury to investigate criminal activities cannot be harmed to any significant extent by recognition of this privilege, since "the area of potential clash" is "a very narrow one." But it is clear that the harm done to the freedom of the press by the forced disclosure of confidential communications, or by the forced appearance of a reporter before a secret grand jury investigation, will be substantial.

Furthermore, the Amicus attempts to point out that the possibility that a reporter may be called upon to divulge his sources of information has not hampered news reporting in the past.

> The fact remains that the news gathering process has functioned effectively and efficiently in this country for almost 200 years without benefit of the special protection sought in these cases (p. 6).

But this statement ignores two important facts. First, until recently, the so-called "danger" that a reporter might be called upon to divulge his sources of information has been remote at best, and was never clearly

threatened as it is today. Secondly, the Amicus ignores the fact that many stories have reached the press solely due to the fact that anonyimity has been promised the source by the newsgatherer. *See,* Guest and Stanzler, *The Constitutional Argument For Newsman Concerning Their Sources,* 64 Nw. L. Rev. 18 (1969). The actions of the Jefferson and Franklin County Grand Juries, if upheld, will make such assurances meaningless in the future, with the result that news will be withheld due to the valid fear of the source of such news that his identity will be forcibly discovered.

Respectfully submitted,

EDGAR A. ZINGMAN
ROBERT C. EWALD
JON L. FLEISCHAKER
WYATT, GRAFTON & SLOSS
300 Marion E. Taylor Building
Louisville, Kentucky 40202
Counsel for Petitioner

(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BRANZBURG *v.* HAYES ET AL., JUDGES

CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

No. 70–85. Argued February 23, 1972—Decided June 29, 1972*

The First Amendment does not relieve a newspaper reporter of the obligation that all citizens have to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, and therefore the Amendment does not afford him a constitutional testimonial privilege for an agreement he makes to conceal facts relevant to a grand jury's investigation of a crime or to conceal the criminal conduct of his source or evidence thereof. Pp. 13–43.

No. 70–85, 461 S. W. 2d 345 and No. 70–94, — Mass. —, 266 N. E. 2d 297, affirmed; No. 70–57, 434 F. 2d 1081, reversed.

WHITE, J., wrote the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion. DOUGLAS, J., filed a dissenting opinion. STEWART, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined.

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*Together with No. 70–94, *In re Pappas*, on certiorari to the Supreme Judicial Court of Massachusetts, and No. 70–57, *United States* v. *Caldwell*, on certiorari to the United States Court of Appeals for the Ninth Circuit.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 70–85, 70–94, AND 70–57

Paul M. Branzburg, Petitioner, v. John P. Hayes, Judge, etc., et al. (70–85)	On Writ of Certiorari to the Court of Appeals of Kentucky.
In the Matter of Paul Pappas, Petitioner. (70–94)	On Writ of Certiorari to the Supreme Judicial Court of Massachusetts.
United States, Petitioner, v. Earl Caldwell. (70–57)	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 29, 1972]

Opinion of the Court by MR. JUSTICE WHITE, announced by THE CHIEF JUSTICE.

The issue in these cases is whether requiring newsmen to appear and testify before State or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment. We hold that it does not.

I

The writ of certiorari in No. 70–85, *Branzburg* v. *Hayes* and *Branzburg* v. *Meigs*, brings before us two judgments of the Kentucky Court of Appeals, both involving petitioner Branzburg, a staff reporter for the Courier-Journal, a daily newspaper published in Louisville, Jefferson County, Kentucky.

On November 15, 1969, the Courier-Journal carried a story under petitioner's by-line describing in detail his observations of two young residents of Jefferson County synthesizing hashish from marihuana, an activity which, they asserted, earned them about $5,000 in three weeks. The article included a photograph of a pair of hands working above a laboratory table on which was a substance identified by the caption as hashish. The article stated that petitioner had promised not to reveal the identity of the two hashish makers.[1] Petitioner was shortly subpoenaed by the Jefferson County grand jury; he appeared, but refused to identify the individuals he had seen possessing marihuana or the persons he had seen making hashish from marihuana.[2] A state trial court judge[3] ordered petitioner to answer these questions and rejected his contention that the Kentucky reporters' privilege statute, Ky. Rev. Stat. 421.100,[4] the First Amendment of the United States Con-

[1] The article contained the following paragraph: "'I don't know why I'm letting you do this story,' [one informant] said quietly. 'To make the narcs (narcotics detectives) mad, I guess. That's the main reason.' However, Larry and his partner asked for and received a promise that their names would be changed." R., at 3–4.

[2] The Foreman of the grand jury reported that petitioner Branzburg had refused to answer the following two questions: "#1. On November 12, or 13, 1969, who was the person or persons you observed in possession of Marijuana, about which you wrote an article in the Courier-Journal on November 15, 1969? #2. On November 12, or 13, 1969, who was the person or persons you observed compounding Marijuana, producing same to a compound known as Hashish?" R., at 6.

[3] Judge J. Miles Pound. The present respondent in this case, Hon. John P. Hayes, is the successor of Judge Pound.

[4] Ky. Rev. Stat. 421.100 provides:

"No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or

stitution, or §§ 1, 2, and 8 of the Kentucky Constitution authorized his refusal to answer. Petitioner then sought prohibition and mandamus in the Kentucky Court of Appeals on the same grounds, but the Court of Appeals denied the petition. *Branzburg* v. *Pound*, 461 S. W. 2d 345 (1970), modified on denial of rehearing, *id.*, (1971). It held that petitioner had abandoned his First Amendment argument in a supplemental memorandum he had filed and tacitly rejected his argument based on the Kentucky Constitution. It also construed Ky. Rev. Stat. 421.100 as affording a newsman the privilege of refusing to divulge the identity of an informant who supplied him with information but held that the statute did not permit a reporter to refuse to testify about events he had observed personally, including the identities of those persons he had observed.

The second case involving petitioner Branzburg arose out of his later story published on January 10, 1971, which described in detail the use of drugs in Frankfort, Franklin County, Kentucky. The article reported that in order to provide a comprehensive survey of the "drug scene" in Frankfort, petitioner had "spent two weeks interviewing several dozen drug users in the capital city" and had seen some of them smoking marihuana. A number of conversations with and observations of several unnamed drug users were recounted. Subpoenaed to appear before a Franklin County grand jury "to testify in the matter of violation of statutes concerning use and sale of drugs," petitioner Branzburg

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before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected."

moved to quash the summons;[5] the motion was denied although an order was issued protecting Branzburg from revealing "confidential associations, sources or information" but requiring that he "answer any questions which concern or pertain to any criminal act, the commission of which was actually observed by [him]." Prior to the time he was slated to appear before the grand jury, petitioner sought mandamus and prohibition from the Kentucky Court of Appeals, arguing that if he were forced to go before the grand jury or to answer questions regarding the identity of informants or disclose information given to him in confidence, his effectiveness as a reporter would be greatly damaged. The Court of Ap-

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[5] Petitioner's Motion to Quash argued:

"If Mr. Branzburg were required to disclose these confidences to the Grand Jury, or any other person, he would thereby destroy the relationship of trust which he presently enjoys with those in the drug culture. They would refuse to speak to him; they would become even more reluctant than they are now to speak to any newsman; and the news media would thereby be vitally hampered in their ability to cover the views and activities of those involved in the drug culture. The inevitable effect of the subpoena issued to Mr. Branzburg, if it not be quashed by this Court, will be to suppress vital First Amendment freedoms of Mr. Branzburg, of the Courier-Journal, of the news media, and of those involved in the drug culture by driving a wedge of distrust and silence between the news media and the drug culture. This Court should not sanction a use of its process entailing so drastic an incursion upon First Amendment freedoms in the absence of compelling Commonwealth interest in requiring Mr. Branzburg's appearance before the Grand Jury. It is insufficient merely to protect Mr. Branzburg's right to silence after he appears before the Grand Jury. This Court should totally excuse Mr. Branzburg from responding to the subpoena and even entering the Grand Jury room. Once Mr. Branzburg is required to go behind the closed doors of the Grand Jury room, his effectiveness as a reporter in these areas is totally destroyed. The secrecy that surrounds Grand Jury testimony necessarily introduces uncertainties in the minds of those who fear a betrayal of their confidences." R., at 43–44.

peals once again denied the requested writs, reaffirming its construction of Ky. Rev. Stat. 421.100, and rejecting petitioner's claim of a First Amendment privilege. It distinguished *Caldwell* v. *United States*, 434 F. 2d 1081 (CA9 1970), and it also announced its "misgivings" about that decision, asserting that it represented "a drastic departure from the generally recognized rule that the sources of information of a newspaper reporter are not privileged under the First Amendment." It characterized petitioner's fear that his ability to obtain news would be destroyed as "so tenuous that it does not, in the opinion of this court, present an abridgement of freedom of the press within the meaning of that term as used in the Constitution of the United States."

Petitioner sought a writ of certiorari to review both judgments of the Kentucky Court of Appeals, and we granted the writ.[6] 402 U. S. 942 (1971).

[6] After the Kentucky Court of Appeals' decision in *Branzburg* v. *Meigs* was announced, petitioner filed a rehearing motion in *Branzburg* v. *Pound* suggesting that the Court had not passed upon his First Amendment argument and calling to the Court's attention the recent Ninth Circuit decision in *Caldwell* v. *United States*. On Jan. 22, 1971, the Court denied petitioner's motion and filed an amended opinion in the case, adding a footnote, 461 S. W. 2d, at 346 n. 1, to indicate that petitioner had abandoned his First Amendment argument and elected to rely wholly on Ky. Rev. Stat. 421.100 when he filed a Supplemental Memorandum before oral argument. In his Petition for Prohibition and Mandamus, petitioner had clearly relied on the First Amendment, and he had filed his Supplemental Memorandum in response to the State's Memorandum in Opposition to the granting of the writs. As its title indicates, this Memorandum was complementary to petitioner's earlier Petition, and it dealt primarily with the State's construction of the phrase "source of information" in Ky. Rev. Stat. 421.100. The passage which the Kentucky Court of Appeals cited to indicate abandonment of petitioner's First Amendment claim is as follows:

"Thus, the controversy continues as to whether a newsman's source of information should be privileged. However, that question is not before the Court in this case. The Legislature of Kentucky has

In the Matter of Paul Pappas, No. 70–94, originated when petitioner Pappas, a television newsman-photographer working out of the Providence, Rhode Island, office of a New Bedford, Massachusetts, television station, was called to New Bedford on July 30, 1970, to report on civil disorders there which involved fires and other turmoil. He intended to cover a Black Panther news conference at that group's headquarters in a boarded-up store. Petitioner found the streets around the store barricaded, but he ultimately gained entrance to the area and recorded and photographed a prepared statement read by one of the Black Panther leaders at about 3:00 p. m.[7] He then asked for and received permission to re-enter the area. Returning at about 9:00 p. m. that evening, he was allowed to enter and remain inside Panther headquarters. As a condition of entry,

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settled the issue, having decided that a newsman's source of information is to be privileged. Because of this there is no point in citing Professor Wigmore and other authorities who speak against the grant of such a privilege. The question has been many times debated, and the Legislature has spoken. The only question before the Court is the construction of the term 'source of information' as it was intended by the Legislature."

Though the passage itself is somewhat unclear, the surrounding discussion indicates that petitioner was asserting here that the question of whether a common law privilege should be recognized was irrelevant since the legislature had already enacted a statute. In his earlier discussion, petitioner had analyzed certain cases in which the First Amendment argument was made but indicated that it was not necessary to reach this question if the statutory phrase "source of information" were interpreted expansively. We do not interpret this discussion as indicating that petitioner was abandoning his First Amendment claim if the Court of Appeals did not agree with his statutory interpretation argument, and we hold that the constitutional question in *Branzburg* v. *Pound* was properly preserved for review.

[7] Petitioner's news films of this event were made available to the Bristol County District Attorney. R., at 4.

Pappas agreed not to disclose anything he saw or heard inside the store except an anticipated police raid which Pappas, "on his own," was free to photograph and report as he wished. Pappas stayed inside the headquarters for about three hours, but there was no police raid, and petitioner wrote no story and did not otherwise reveal what had transpired in the store while he was there. Two months later, petitioner was summoned before the Bristol County Grand Jury and appeared, answered questions as to his name, address, employment, and what he had seen and heard outside Panther heardquarters, but refused to answer any questions about what had taken place inside headquarters while he was there, claiming that the First Amendment afforded him a privilege to protect confidential informants and their information. A second summons was then served upon him, again directing him to appear before the Grand Jury and "to give such evidence as he knows relating to any matters which may be inquired of on behalf of the commonwealth before . . . the Grand Jury." His motion to quash on First Amendment and other grounds was denied by the trial judge who, noting the absence of a statutory newsman's privilege in Massachusetts, ruled that petitioner had no constitutional privilege to refuse to divulge to the Grand Jury what he had seen and heard, including the identity of persons he had observed. The case was reported for decision to the Supreme Judicial Court of Massachusetts.[8] The record there did not include a transcript of the hearing on the motion to quash nor did it reveal the specific questions petitioner had refused to answer, the expected nature of

[8] The case was reported by the superior court directly to the Supreme Judicial Court for an interlocutory ruling under Mass. Gen. Law, c. 278, § 30A and Mass. Gen. Law, c. 231, § 111. The Supreme Judicial Court's decision appears at — Mass. —, 266 N. E. 2d 297 (1971).

his testimony, the nature of the grand jury investigation, or the likelihood of the grand jury securing the information it sought from petitioner by other means.[9] The Supreme Judicial Court, however, took "judicial notice that in July, 1970, there were serious civil dirorders in New Bedford, which involved street barricades, exclusion of the public from certain streets, fires, and similar turmoil. We were told at the arguments that there was gunfire in certain streets. We assume that the grand jury investigation was an appropriate effort to discover and indict those responsible for criminal acts." — Mass. —, 266 N. E. 2d, at 299. The Court then reaffirmed prior Massachusetts holdings that testimonial privileges were "exceptional" and "limited," stating that "[t]he principle that the public 'has a right to every man's evidence' " had usually been preferred, in the Commonwealth, to countervailing interests. *Ibid.* The Court rejected the holding of the Ninth Circuit in *Caldwell* v. *United States, supra,* and "adhere[d] to the view that there exists no constitutional newsman's privilege, either qualified or absolute, to refuse to appear and testify before a court or grand jury."[10] — Mass. —, 266 N. E. 2d, at 302–303. Any adverse effect upon the free dissemination of news by virtue of petitioner's being called to testify was deemed to be

[9] "We do not have before us the text of any specific questions which Pappas has refused to answer before the grand jury, or any petition to hold him for contempt for his refusal. We have only general statements concerning (a) the inquiries of the grand jury, and (b) the materiality of the testimony sought from Pappas. The record does not show the expected nature of his testimony or what likelihood there is of being able to obtain that testimony from persons other than news gatherers." — Mass. —, 226 N. E. 2d, at 299 (footnote omitted).

[10] The Court expressly declined to consider, however, appearances of newsmen before legislative or administrative bodies. — Mass. —, 266 N. E. 2d, at 303 n. 10.

only "indirect, theoretical, and uncertain." — Mass. —, 266 N. E. 2d, at 302. The court concluded that "The obligation of newsmen . . . is that of every citizen, . . . to appear when summoned, with relevant written or other material when required, and to answer relevant and reasonable inquiries." — Mass. —, 266 N. E. 2d, at 303. The court nevertheless noted that grand juries were subject to supervision by the presiding judge, who had the duty "to prevent oppressive, unnecessary, irrelevant, and other improper inquiry and investigation," to insure that a witness' Fifth Amendment rights were not infringed, and to assess the propriety, necessity, and pertinence of the probable testimony to the investigation in progress.[11] *Ibid.* The burden was deemed to be on the witness to establish the impropriety of the summons or the questions asked. The denial of the motion to quash was affirmed and we granted a writ of certiorari to petitioner Pappas. 402 U. S. 942 (1971).

United States v. *Caldwell,* No. 70–57, arose from subpoenas issued by a federal grand jury in the Northern District of California to respondent Earl Caldwell, a reporter for the New York Times assigned to cover the Black Panther Party and other black militant groups. A subpoena *duces tecum* was served on respondent on February 2, 1970, ordering him to appear before the grand jury to testify and to bring with him notes and

[11] The Court noted that "a presiding judge may consider in his discretion" the argument that the use of newsmen as witnesses is likely to result in unnecessary or burdensome use of their work product, — Mass. —, 266 N. E. 2d, at 304 n. 13, and cautioned that "We do not suggest that a general investigation of mere political or group association of persons, without substantial relation to criminal events, may not be viewed by a judge in a somewhat different manner from an investigation of particular criminal events concerning which a newsman may have knowledge." — Mass. —, 266 N. E. 2d, at 304 n. 14.

tape recordings of interviews given him for publication by officers and spokesmen of the Black Panther Party concerning the aims, purposes, and activities of that organization.[12] Respondent objected to the scope of this subpoena, and an agreement between his counsel and the government attorneys resulted in a continuance. A second subpoena was served on March 16, which omitted the documentary requirement and simply ordered Caldwell "to appear . . . to testify before the Grand Jury." Respondent and his employer, the New York Times,[13] moved to quash on the ground that the unlimited breadth of the subpoenas and the fact that Caldwell would have to appear in secret before the grand jury would destroy his working relationship with the Black Panther Party and "suppress vital First Amendment freedoms . . . by driving a wedge of distrust and silence between the news media and the militants." R., at 7. Respondent argued that "so drastic an incursion upon First Amendment freedoms" should not be permitted "in the absence of a compelling governmental interest—not shown here—in requiring Mr. Caldwell's appearance before the grand jury." *Ibid.* The motion was supported by *amicus curiae* memoranda from other publishing concerns and by affidavits from

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[12] The subpoena ordered production of "Notes and tape recordings of interviews covering the period from January 1, 1969, to date, reflecting statements made for publication by officers and spokesmen for the Black Panther Party concerning the aims and purposes of said organization and the activities of said organization, its officers, staff, personnel, and members, including specifically but not limited to interviews given by 'David Hilliard and Raymond 'Masai' Hewitt." R., at 20.

[13] The New York Times was granted standing to intervene as a party on the motion to quash the subpoenas. *Application of Caldwell*, 311 F. Supp. 358, 359 (ND Cal., 1970). It did not file an appeal from the District Court's contempt citation, and it did not seek certiorari here. It has filed an *amicus curiae* brief, however.

newsmen asserting the unfavorable impact on news sources of requiring reporters to appear before grand juries. The Government filed three memoranda in opposition to the motion to quash, each supported by affidavits. These documents stated that the grand jury was investigating, among other things, possible violations of a number of criminal statutes, including 18 U. S. C. § 871 (threats against the President), 18 U. S. C. § 1751 (assassination, attempts to assassinate, conspiracy to assassinate the President), 18 U. S. C. § 231 (civil disorders), 18 U. S. C. § 2101 (interstate travel to incite a riot), and 18 U. S. C. § 1341 (mail frauds and swindles). It was recited that on November 15, 1969, an officer of the Black Panther Party made a publicly televised speech in which he had declared that "We will kill Richard Nixon" and that this threat had been repeated in three subsequent issues of the Party newspaper. R., at 66, 77. Also referred to were various writings by Caldwell about the Black Panther Party, including an article published in the New York Times on December 14, 1969, stating that "[i]n their role as the vanguard in a revolutionary struggle the Panthers have picked up guns" and quoting the Chief of Staff of the Party as declaring that "We advocate the very direct overthrow of the Government by way of force and violence. By picking up guns and moving against it because we recognize it as being oppressive and in recognizing that we know that the only solution to it is armed struggle [*sic*]." R., at 62. The Government also stated that the Chief of Staff of the Party had been indicted by the grand jury on December 3, 1969, for uttering threats against the life of the President in violation of 18 U. S. C. § 871 and that various efforts had been made to secure evidence of crimes under investigation through the immunization of persons allegedly associated with the Black Panther Party.

An April 6, the District Court denied the motion to quash, *Application of Caldwell*, 311 F. Supp. 358 (ND Cal. 1970), on the ground that "*every person* within the jurisdiction of the government" is bound to testify upon being properly summoned. *Id.*, at 360 (emphasis in original). Nevertheless, the court accepted respondent's First Amendment arguments to the extent of issuing a protective order providing that although respondent must divulge whatever information had been given to him for publication, he "shall not be required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination to the public through the press or other news media." The court held that the First Amendment afforded respondent a privilege to refuse disclosure of such confidential information until that had been "a showing by the Government of a compelling and overriding national interest in requiring Mr. Caldwell's testimony which cannot be served by any alternative means." 311 F. Supp., at 362.

Subsequently,[14] the term of the grand jury expired, a new grand jury was convened, and a new subpoena *ad testificandum* was issued and served on May 22, 1970. A new motion to quash by respondent and memorandum in opposition by the Government were filed, and by stipulation of the parties, the motion was submitted on the prior record. The court denied the motion to quash, repeating the protective provisions in its prior order but this time directing Caldwell to appear before the grand jury pursuant to the May 22 subpoena. Respondent refused to appear before the grand jury, and the

[14] Respondent appealed from the District Court's April 6 denial of his motion to quash on April 17, 1970, and the Government moved to dismiss that appeal on the ground that the order was interlocutory. On May 12, 1970, the Ninth Circuit dismissed the appeal without opinion.

court issued an order to show cause why he should not be held in contempt. Upon his further refusal to go before the grand jury, respondent was ordered committed for contempt until such time as he complied with the court's order or until the expiration of the term of the grand jury.

Respondent Caldwell appealed the contempt order,[15] and the Court of Appeals reversed. *Caldwell* v. *United States*, 434 F. 2d 1081 (CA9 1970). Viewing the issue before it as whether Caldwell was required to appear before the grand jury at all, rather than the scope of permissible interrogation, the court first determined that the First Amendment provided a qualified testimonial privilege to newsmen; in its view, requiring a reporter like Caldwell to testify would deter his informants from communicating with him in the future and would cause him to censor his writings in an effort to avoid being subpoenaed. Absent compelling reasons for requiring his testimony, he was held privileged to withhold it. The court also held, for similar First Amendment reasons, that absent some special showing of necessity by the Government, attendance by Caldwell at a secret meeting of the grand jury was something he was privileged to refuse because of the potential impact of such an appearance on the flow of news to the public. We granted the United States' petition[16] for certiorari. 402 U. S. 942 (1971).

I

Petitioners Branzburg and Pappas and respondent Caldwell press First Amendment claims that may be

[15] The Government did not file a cross-appeal and did not challenge the validity of the District Court protective order in the Court of Appeals.

[16] The petition presented a single question: "Whether a newspaper reporter who has published articles about an organization can, under the First Amendment, properly refuse to appear before a grand jury investigating possible crimes by members of that organization who have been quoted in the published articles."

simply put: that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment. Although petitioners do not claim an absolute privilege against official interrogation in all circumstances, they assert that the reporter should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure. Principally relied upon are prior cases emphasizing the importance of the First Amendment guarantees to individual development and to our system of representative government,[17] decisions requiring that official action with adverse impact on First Amendment rights be justified by a public interest that is "compelling" or "paramount," [18] and those precedents establishing the principle

[17] *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 145 (1967) (opinion of Harlan, J.); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964); *Talley* v. *California*, 362 U. S. 60, 64–65 (1960); *Bridges* v. *California*, 314 U. S. 252, 263 (1941); *Grosjean* v. *American Press Co., Inc.*, 297 U. S. 233, 250 (1936); *Near* v. *Minnesota*, 283 U. S. 697, 722 (1931).

[18] *NAACP* v. *Button*, 371 U. S. 415, 439 (1963); *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945); *DeGregory* v. *Attorney General of New Hampshire*, 383 U. S. 825, 829 (1966); *Bates* v. *Little Rock*, 361 U. S. 516, 524 (1960); *Schneider* v. *State*, 308 U. S. 147, 161 (1939); *NAACP* v. *Alabama*, 357 U. S. 449, 464 (1958).

that justifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association.[19] The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information.[20]

We do not question the significance of free speech, press or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. But this case involves no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from

[19] *Freedman* v. *Maryland*, 380 U. S. 51, 56 (1965); *NAACP* v. *Alabama*, 377 U. S. 288, 307 (1964); *Martin* v. *City of Struthers*, 319 U. S. 141, 147 (1943); *Elfbrandt* v. *Russell*, 384 U. S. 11, 18 (1966).

[20] There has been a great deal of writing in recent years on the existence of a newsman's constitutional right of nondisclosure of confidential information. See, *e. g.*, Beaver, The Newsman's Code, The Claim of Privilege, and Everyman's Right to Evidence, 47 Ore. L. Rev. 243 (1968); Guest & Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources, 64 Nw. U. L. Rev. 18 (1969); Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L. J. 317 (1970); Note, The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation, 58 Calif. L. Rev. 1198 (1970); Note, The Right of the Press to Gather Information, 71 Col. L. Rev. 838 (1971); Nelson, The Newsmen's Privilege Against Disclosure of Confidential Sources of Information, 24 Vand. L. Rev. 667 (1971).

any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence.[21] The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them.

It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite

[21] "In general, then, the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege. . . . No pledge of privacy nor oath of secrecy can avail against demand for the truth in a court of justice." 8 J. Wigmore, Evidence § 2286 (McNaughton rev. 1961). This was not always the rule at common law, however. In 17th century England, the obligations of honor among gentlemen were occasionally recognized as privileging from compulsory disclosure information obtained in exchange for a promise of confidence. See *Bulstrod* v. *Letchmere*, 22 Eng. Rep. 1019 (1676); *Lord Grey's Trial*, 9 How. St. Tr. 127 (1682).

the possible burden that may be imposed. The Court has emphasized that "[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Associated Press* v. *NLRB*, 301 U. S. 103, 132–133 (1937). It was there held that the Associated Press, a news-gathering and disseminating organization, was not exempt from the requirements of the National Labor Relations Act. The holding was reaffirmed in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 192–193 (1946), where the Court rejected the claim that applying the Fair Labor Standards Act to a newspaper publishing business would abridge the freedom of press guaranteed by the First Amendment. See also *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178 (1946). *Associated Press* v. *United States*, 326 U. S. 1 (1945), similarly overruled assertions that the First Amendment precluded application of the Sherman Act to a news gathering and disseminating organization. Cf. *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer's Publishing Co.*, 293 U. S. 268, 276 (1934); *Citizen Publishing Co.* v. *United States*, 394 U. S. 131, 139 (1969); *Lorain Journal Co.* v. *United States*, 342 U. S. 143, 155–156 (1951). Likewise, a newspaper may be subjected to nondiscriminatory forms of general taxation. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1936); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 112 (1943).

The prevailing view is that the press is not free with impunity to publish everything and anything it desires to publish. Although it may deter or regulate what is said or published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254,

279–280 (1964); *Garrison* v. *Louisiana*, 379 U. S. 64, 74 (1964); *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 147 (1967) (opinion of Harlan, J.); *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 277 (1971). A newspaper or a journalist may also be punished for contempt of court, in appropriate circumstances. *Craig* v. *Harney*, 331 U. S. 367, 377–378 (1947).

It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. *Zemel* v. *Rusk*, 381 U. S. 1, 16–17 (1965); *New York Times Co.* v. *United States*, 403 U. S. 713, 728–730 (1971) (STEWART, J., concurring); *Tribune Review Publishing Co.* v. *Thomas*, 254 F. 2d 883, 885 (CA3 1958); *In the Matter of United Press Anns.* v. *Valente*, 308 N. Y. 71, 77, 123 N. E. 2d 777, 778 (1954). In *Zemel* v. *Rusk*, *supra*, for example, the Court sustained the Government's refusal to validate passports to Cuba even though that restriction "rendered less than wholly free the flow of information concerning that country." *Id.*, at 16. The ban on travel was held constitutional, for "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Id.*, at 17.[22]

Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or

[22] "There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right." 381 U. S., at 16–17.

disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal. In *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966), for example, the Court reversed a state court conviction where the trial court failed to adopt "stricter rules governing the use of the courtroom by newsmen as Sheppard's counsel requested," neglected to insulate witnesses from the press, and made no "effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides." *Id.*, at 358, 359. "[T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters." *Id.*, at 361. See also *Estes* v. *Texas*, 381 U. S. 532, 539–540 (1965); *Rideau* v. *Louisiana*, 373 U. S. 723, 726 (1963).

It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation. At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury. See, *e. g.*, *Ex parte Lawrence*, 116 Cal. 298, 48 P. 124 (1897); *Plunkett* v. *Hamilton*, 136 Ga. 72, 70 S. E. 781 (1911); *Clein* v. *State*, 52 So. 2d 117 (Fla. 1950); *In re Grunow*, 84 N. J. L. 235, 85 A. 1011 (1913); *People ex rel. Mooney* v. *Sheriff*, 269 N. Y. 291, 199 N. E. 415 (1936); *Joslyn* v. *People*, 67 Col. 297, 184 P. 375 (1919); *Adams* v. *Associated Press*, 46 F. R. D. 439 (SD Tex. 1969); *Brewster* v. *Boston Herald-Traveler Corp.*, 20 F. R. D. 416 (Mass. 1957). See generally Annot., 7 A. L. R. 3d 591 (1966). In 1958, a newsgatherer asserted for the first time that the First Amend-

ment exempted confidential information from public disclosure pursuant to a subpoena issued in a civil suit, *Garland* v. *Torre*, 259 F. 2d 545 (CA2), cert. denied, 358 U. S. 910 (1958), but the claim was denied, and this argument has been almost uniformly rejected since then, although there are occasional dicta that, in circumstances not presented, a newsman might be excused. *In re Goodfader*, 45 Haw. 317, 367 P. 2d 472 (1961); *In re Taylor*, 412 Pa. 32, 193 A. 2d 181 (1963); *State* v. *Buchanan*, 250 Ore. 244, 436 P. 2d 729, cert denied, 392 U. S. 905 (1968); *Murphy* v. *Colorado* (Colo. Supreme Court), cert. denied, 365 U. S. 843 (1961) (unreported, discussed in *In re Goodfader*, *supra*, 45 Haw., at 366, 367 P. 2d, at 498 (Mizuha, J., dissenting)). These courts have applied the presumption against the existence of an asserted testimonial privilege, *United States* v. *Bryan*, 339 U. S. 323, 331 (1950), and have concluded that the First Amendment interest asserted by the newsman was outweighed by the general obligation of a citizen to appear before a grand jury or at trial, pursuant to a subpoena, and give what information he possesses. The opinions of the state courts in *Branzburg* and *Pappas* are typical of the prevailing view, although a few recent cases, such as *Caldwell*, have recognized and given effect to some form of constitutional newsman's privilege. See *State* v. *Knops*, 49 Wis. 2d 647, 183 N. W. 2d 93 (1971) (dictum); *Alioto* v. *Cowles Communication, Inc.*, C. A. 52150 (ND Cal. 1969); *In re Grand Jury Witnesses*, 322 F. Supp. 573 (ND Cal. 1970); *People* v. *Dohrn*, Crim. No. 69–3808 (Cook County, Ill., Cir. Ct. 1970).

The prevailing constitutional view of the newsman's privilege is very much rooted in the ancient role of the grand jury which has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against un-

founded criminal prosecutions.[23] Grand jury proceedings are constitutionally mandated for the institution of federal criminal prosecutions for capital or other serious crimes, and "its constitutional preprogatives are rooted in long centuries of Anglo-American history." *Hannah* v. Larche, 363 U. S. 420, 489 (1960) (Frankfurter, J., concurring). The Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[24] The adoption of the grand jury "in our Constitution as the sole method of preferring charges in serious criminal cases shows the high place it held as an instrument of justice." *Costello* v. *United States*, 350 U. S. 359, 362 (1956). Although state systems of criminal procedure differ greatly among themselves, the grand jury is similarly guaranteed by many state constitutions and plays an important role in fair and effective law enforcement in the overwhelming majority of the States.[25] Because its task is to

[23] "Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Wood* v. *Georgia*, 370 U. S. 375, 390 (1962) (footnote omitted).

[24] It has been held that "infamous" punishments include confinement at hard labor, *United States* v. *Moreland*, 258 U. S. 433 (1922); incarceration in a penitentiary, *Mackin* v. *United States*, 117 U. S. 348 (1886); and imprisonment for more than a year. *Barkman* v. *Sanford*, 162 F. 2d 592 (CA5), cert. denied, 332 U. S. 816 (1947). Fed. Rule Crim. Proc. 7 (a) has codified these holdings: "An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment, or if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information."

[25] Although indictment by grand jury is not part of the due

inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily board. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair* v. *United States*, 250 U. S. 273, 282 (1919). Hence the grand jury's authority to subpoena witnesses is not only historic, *id.*, at 279–281, but essential to its task. Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the long standing principle that "the public has a right to every man's evidence," except for those persons protected by a constitutional, common law, or statutory privilege, *United States* v. *Bryan*, 339 U. S. 323, 331 (1950); *Blackmer* v. *United States*, 284 U. S. 421, 438 (1932); 8 J. Wigmore, Evidence § 2192 (McNaughton rev. 1961), is particularly applicable to grand jury proceedings.[26]

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process of law guaranteed to State criminal defendants by the Fourteenth Amendment, *Hurtado* v. *California*, 110 U. S. 516 (1884), a recent study reveals that 32 States require that certain kinds of criminal prosecutions be initiated by indictment. Spain, The Grand Jury, Past and Present: A Survey, 1 Am. Crim. L. Q. 119, 126–142 (1964). In the 18 States in which the prosecutor may proceed by information, the grand jury is retained as an alternative means of invoking the criminal process and as an investigative tool. *Ibid.*

[26] Jeremy Bentham vividly illustrated this maxim:

"Are men of the first rank and consideration, are men high in office, men whose time is not less valuable to the public than to themselves,—are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary,—they and everybody! . . . Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a

A number of States have provided newsmen a statutory privilege of varying breadth,[27] but the majority have not done so, and none has been provided by federal statute.[28] Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy.

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chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly." 4 The Works of Jeremy Bentham 320 (Bowring ed. 1843).

In *United States* v. *Burr*, 25 F. Cas. 30, 34 (Cir. Ct. D. Va. 1807) (No. 14,692d), Chief Justice Marshall, sitting on Circuit, opined that in proper circumstances a subpoena could be issued to the President of the United States.

[27] Thus far, 17 States have provided some type of statutory protection to a newsman's confidential sources:

Ala. Code Recompiled Tit. 7, § 370 (1960); Alaska Stat. § 09.25.150 (1967, 1970 Cum. Supp.); Ariz. Rev. Stat. Ann. § 12-2237 (1969 Supp.); Ark. Stat. Ann. § 43-917 (1964); Cal. Evid. Code Ann. § 1070 (West 1966); Ind. Ann. Stat. § 2-1733 (1968); Ky. Rev. Stat. § 421.100 (1969); La. Rev. Stat. § 45:1451-54 (1970 Cum. Supp.); Md. Ann. Code Art. 35, § 2 (1971); Mich. Stat. Ann. § 28.945 (1) (1954); Mont. Rev. Codes Ann. Tit. 93, ch. 601-2 (1964); Nev. Rev. Stat. § 48.087 (1969); N. J. Stat. Ann. Tit. 2A ch. 84A, §§ 21, 29 (Supp. 1969); N. M. Stat. Ann. § 20-1-12.1 (1953, 1967 Rev.); N. Y. Civ. Rights Law § 79-h (McKinney 1970); Ohio Rev. Code Ann. § 2739.12 (1953); Pa. Stat. Ann. Tit. 28, § 330 (1959, 1970 Cum. Supp.).

[28] Such legislation has been introduced, however. See, *e. g.*, S. 1311, S. 3552, 91st Cong., 2d Sess. (1970); H. R. 16328, H. R. 16704, 91st Cong., 2d Sess. (1970); S. 1851, 88th Cong., 1st Sess. (1963); H. R. 8519, H. R. 7787, 88th Cong., 1st Sess. (1963); S. 965, 86th Cong., 1st Sess. (1959); H. R. 355, 86th Cong., 1st Sess. (1959). For a general analysis of proposed congressional legislation, see Staff of Senate Committee on the Judiciary, 89th Cong., 2d Sess., The Newsman's Privilege (Comm. Print 1966).

This we decline to do.[29] Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering which is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

This conclusion itself involves no restraint on what

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[29] The creation of new testimonial privileges has been met with disfavor by commentators since such privileges obstruct the search for truth. Wigmore condemns such privileges as "so many derogations from a positive general rule [that everyone is obligated to testify when properly summoned]" and as "obstacle[s] to the administration of justice." 8 Wigmore, On Evidence, § 2192 (McNaughton rev. 1961). His criticism that "*all privileges of exemption from this general duty are exceptional* and are therefore to be discountenanced," *id.*, at § 2192, p. 73 (emphasis in original) has been frequently echoed. Morgan, "Foreward," Model Code of Evidence 22–30 (1942); Chafee, Government and Mass Communications 496–497 (1947); ABA Committee on Improvements in the Law of Evidence, Report, 63 A. B. A. Reports 595 (1938); McCormick, On Evidence 159 (1972); Chafee, "Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?," 52 Yale L. J. 607 (1943); Ladd, "Privileges," 1969 Law and the Social Order 555, 556 (1969); 58 Am. Jur., Witnesses § 546 (1948); 97 C. J. S., Witnesses § 259 (1957); *McMann* v. *Securities and Exchange Commission*, 87 F. 2d 377, 378 (CA2 1938) (L. Hand, J.). Neither the ALI's Model Code of Evidence (1942), the National Conference of Commissioners on Uniform State Laws' Uniform Rules of Evidence (1953), nor the Proposed Rules of Evidence for the United States Courts and Magistrates (rev. ed. 1971) have included a newsman's privilege.

newspapers may publish or on the type or quality of information reporters may seek to acquire, nor does it threaten the vast bulk of confidential relationships between reporters and their sources. Grand juries address themselves to the issues of whether crimes have been committed and who committed them. Only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas. Nothing before us indicates that a large number or percentage of *all* confidential news sources fall into either category and would in any way be deterred by our holding that the Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task.

The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection. It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate otherwise valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial. The Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct

forbidden to all other persons. To assert the contrary proposition

> "is to answer it, since it involves in its very statement the contention that the freedom of the press is a freedom to do wrong with impunity, and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. . . . It suffices to say that, however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing." *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 419–420 (1918).[30]

Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.

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[30] The holding in this case involved a construction of the Contempt Act of 1831, 4 Stat. 487, which permitted summary trial of contempts "so near [to the court] as to obstruct the administration of justice." The Court held that the Act required only that the conduct have a "direct tendency to prevent and obstruct the discharge of judicial duty." 247 U. S., at 419. This view was overruled and the Act given a much narrower reading in *Nye* v. *United States*, 313 U. S. 33, 47–52 (1941). See *Bloom* v. *Illinois*, 391 U. S. 194, 205–206 (1968).

There remain those situations where a source is not engaged in criminal conduct but has information suggesting illegal conduct by others. Newsmen frequently receive information from such sources pursuant to a tacit or express agreement to withhold the source's name and suppress any information that the source wishes not published. Such informants presumably desire anonymity in order to avoid being entangled as a witness in a criminal trial or grand jury investigation. They may fear that disclosure will threaten their job security or personal safety or that it will simply result in dishonor or embarrassment.

The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational, nor are the records before us silent on the matter. But we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury. The available data indicates that some newsmen rely a great deal on confidential sources and that some informants are particularly sensitive to the threat of exposure and may be silenced if it is held by this Court that, ordinarily, newsmen must testify pursuant to subpoenas,[31] but the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common law and constitutional rule regarding the testimonial obligations of newsmen. Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and

[31] Respondent Caldwell attached a number of affidavits from prominent newsmen to his initial motion to quash which detail the experiences of such journalists after they have been subpoenaed. R., at 22–61.

to a great extent speculative.[32] It would be difficult to canvass the views of the informants themselves; surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in the light of the professional self-interest of the interviewees.[33] Reliance by the press on confidential informants does not mean that all such sources will in fact dry up because of the later possible appearance of the newsman before a grand jury. The reporter may never be called and if he objects to testifying, the prosecution may not insist. Also, the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena: quite often, such informants are members of a minority political or cultural group which

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[32] Cf., *e. g.*, the results of a study conducted by Guest & Stanzler, which appears as an appendix to their article, "The Constitutional Argument for Newsmen Concealing their Sources," 64 Nw. U. L. Rev. 18, 57 (1969). A number of editors of daily newspapers of varying circulation were asked the question, "Excluding one- or two-sentence gossip items, on the average how many stories based on information received in confidence are published in your paper each year? Very rough estimate." Answers varied significantly *e. g.*, "Virtually innumerable," Tucson Daily Citizen (41,969 daily circ.), "Too many to remember," Los Angeles Hearld-Examiner (718,221 daily circ.), "Occasionally," Denver Post (252,084 daily circ.), "Rarely" Cleveland Plain Dealer (370,499 daily circ.), "Very rare, some politics," Oregon Journal (146,403 daily circ.). This study did not purport to measure the extent of deterrence of informants caused by subpoenas to the press.

[33] In his Press Subpoenas: An Empirical and Legal Analysis 6-12 (1971), Prof. Blasi discusses these methodological problems. Prof. Blasi's survey found that slightly more than half of the 975 reporters questioned said that they relied on regular confidential sources for at least 10% of their stories. *Id.*, at 21. Of this group of reporters, only 8% were able to say with some certainty that their professional functioning had been adversely affected by the threat of subpoena; another 11% were not certain whether or not they had been adversely affected. *Id.*, at 53.

relies heavily on the media to propagate its views, publicize its aims, and magnify its exposure to the public. Moreover, grand juries characteristically conduct secret proceedings, and law enforcement officers are themselves experienced in dealing with informers and have their own methods for protecting them without interference with the effective administration of justice. There is little before us indicating that informants whose interest in avoiding exposure is that it may threaten job security, personal safety, or peace of mind, would in fact, be in a worse position, or would think they would be, if they risked placing their trust in public officials as well as reporters. We doubt if the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime will always or very often be deterred by the prospect of dealing with those public authorities characteristically charged with the duty to protect the public interest as well as his.

Accepting the fact, however, that an undetermined number of informants not themselves implicated in crime will nevertheless, for whatever reason, refuse to talk to newsmen if they fear identification by a reporter in an official investigation, we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.

We note first that the privilege claimed is that of the reporter, not the informant, and that if the authorities independently identify the informant, neither his own reluctance to testify nor the objection of the newsman would shield him from grand jury inquiry, whatever the impact on the flow of news or on his future usefulness as a secret source of information. More impor-

tant, it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy. Historically, the common law recognized a duty to raise the "hue and cry" and report felonies to the authorities.[34] Misprision of a felony—that is, the concealment of a felony "which a man knows but never assented to . . . [so as to become] either principal or accessory," 4 Blackstone, Commentaries, c. 9, *121 (Lewis ed. 1902), was often said to be a common law crime.[35] The first Congress passed a statute, 1 Stat. 113, as amended, 35 Stat. 1114, 62 Stat. 684, which is still in effect, defining a federal crime of misprison:

> "Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States shall be [guilty of misprison]." 18 U. S. C. § 4.[36]

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[34] See Statute of Westminister the First, 3 Edw. I, c. IX, at 43 (1275); Statute of Winchester, 13 Edw. I, c. VI, at 114–115 (1285); Sheriffs Act of 1887, 50 & 51 Vict., c. 55, § 8 (1); 4 Blackstone, Commentaries, c. 21, *293–*295 (Lewis ed. 1902); 2 Holdsworth, History of English Law 80–81, 101–102 (3d ed. 1927); 4 *ibid.*, at 521–522.

[35] See, *e. g.*, *Scrope's Case*, 3 Co. Inst. 36 (1415); *Rex* v. *Cowper*, 87 Eng. Rep. 611 (1696); Proceedings under a Special Commission for the County of York, 31 Stat. Tr. 969 (1813); *Sykes* v. *Director of Public Prosecutions*, 3 W. L. R. 371 (1961). But see Crabbe, Misprison of Felony—Shadow or Phantom?, 8 Am. J. Legal Hist. 189 (1964). See also Act 5 and 6 Edw. VI, c. 11 (1512).

[36] This statute has been construed, however, to require both knowledge of a crime and some affirmative act of concealment or participation. *Bratton* v. *United States*, 73 F. 2d 795 (CA10 1934); *United States* v. *Farrar*, 38 F. 2d 515, 516 (Mass. 1930), aff'd on other grounds, 281 U. S. 613 (1930); *United States* v. *Norman*, 391 F. 2d

It is apparent from this statute, as well as from our history and that of England, that concealment of crime and agreements to do so are not looked upon with favor. Such conduct deserves no encomium, and we decline now to afford it First Amendment protection by denigating the duty of a citizen whether reporter or informer, to respond to grand jury subpoena and answer relevant questions put to him.

Of course, the press has the right to abide by its agreement not to publish all the information it has, but the right to withhold news is not equivalent to a First Amendment exemption from the ordinary duty of all other citizens to furnish relevant information to a grand jury performing an important public function. Private restraints on the flow of information are not so favored by the First Amendment that they override all other public interests. As Justice Black declared in another context, "Freedom of the Press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945).

Neither are we now convinced that a virtually impenetrable constitutional shield, beyond legislative or judicial control, should be forged to protect a private system of informers operated by the press to report on criminal conduct, a system that would be unaccountable to the public, would pose a threat to the citizen's justifiable expectations of privacy, and would equally protect well-intentioned informants and those who for pay or otherwise betray their trust to their employer or associates. The public through its elected and appointed

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212 (CA6 1968), cert. denied, 390 U. S. 1014 (1968); *Lancey* v. *United States*, 356 F. 2d 407 (CA9), cert. denied, 385 U. S. 922 (1966). Cf. *Marbury* v. *Brooks*, 7 Wheat. 556, 575 (1822) (Marshall, C. J.).

law enforcement officers regularly utilizes informers, and in proper circumstances may assert a privilege against disclosing the identity of these informers. But

> "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." *Roviaro* v. *United States*, 353 U. S. 53, 59 (1957).

Such informers enjoy no constitutional protection. Their testimony is available to the public when desired by grand juries or at criminal trials; their identity cannot be concealed from the defendant when it is critical to his case. *Roviaro* v. *United States*, *supra*, at 60–61, 62; *McCray* v. *Illinois*, 386 U. S. 300, 310 (1967); *Smith* v. *Illinois*, 390 U. S. 129, 131 (1968); *Alford* v. *United States*, 282 U. S. 687, 693 (1931). Clearly, this system is not impervious to control by the judiciary and the decision whether to unmask an informer or to continue to profit by his anonymity is in public, not private, hands. We think that it should remain there and that public authorities should retain the options of either insisting on the informer's testimony relevant to the prosecution of crime or of seeking the benefit of further information that his exposure might prevent.

We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional pro-

tection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.[37]

It is said that currently press subpoenas have multiplied,[38] that mutual distrust and tension between press and officialdom have increased, that reporting styles have changed, and that there is now more need for confidential sources, particularly where the press seeks news about minority cultural and political groups or dissident organizations suspicious of the law and public officials. These developments, even if true, are treacherous grounds for a far-reaching interpretation of the First Amendment fastening a nationwide rule on courts, grand juries, and prosecuting officials everywhere. The obligation to testify in response to grand jury subpoenas will not threaten these sources not involved with criminal conduct and without information relevant to grand jury investigations, and we cannot hold that the Constitution places the sources in these two categories either above the law or beyond its reach.

The argument for such a constitutional privilege rests heavily on those cases holding that the infringement of protected First Amendment rights must be no broader than necessary to achieve a permissible governmental purpose, see cases cited at n. 19. We do not deal, however, with a governmental institution that has abused its

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[37] Though the constitutional argument for a newsman's privilege has been put forward very recently, newsmen have contended for a number of years that such a privilege was desirable. See, *e. g.*, Siebert & Ryniker, Editor and Publisher 36–37 (Sept. 1, 1934); Bird & Mervin, The Newspaper and Society 567 (1942). The first newsman's privilege statute was enacted by Maryland in 1896, and currently is codified as Md. Ann. Code Art. 35, § 2 (1971).

[38] A list of recent subpoenas to the news media is contained in the appendix to the brief of *amicus* New York Times in No. 70–57.

proper function, as a legislative committee does when it "expose[s] for the sake of exposure." *Watkins* v. *United States*, 354 U. S. 178, 200 (1957). Nothing in the record indicates that these grand juries were "prob[ing] at will and without relation to existing need." *DeGregory* v. *Attorney General of New Hampshire*, 383 U. S. 825, 829 (1966). Also, there is no attempt here by the grand juries to invade protected First Amendment rights by forcing wholesale disclosure of names and organizational affiliations for a purpose which is not germane to the determination of whether crime has been committed, cf. *NAACP* v. *Alabama*, 357 U. S. 449 (1958); *NAACP* v. *Button*, 371 U. S. 415 (1963); *Bates* v. *Little Rock*, 361 U. S. 516 (1960), and the characteristic secrecy of grand jury proceedings is a further protection against the undue invasion of such rights. See Fed. Rule Crim. Proc. 6 (e). The investigative power of the grand jury is necessarily broad if its public responsibility is to be adequately discharged. *Costello* v. *United States*, 350 U. S. 359, 364 (1956).

The requirements of those cases, see n. 18, *supra*, which hold that a State's interest must be "compelling" or "paramount" to justify even an indirect burden on First Amendment rights, are also met here. As we have indicated, the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen, and it appears to us that calling reporters to give testimony in the manner and for the reasons that other citizens are called "bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." *Bates* v. *Little Rock*, *supra*, at 525. If the test is that the Government "convincingly show a substantial relation between the information sought and

a subject of overriding and compelling state interest," *Gibson* v. *Florida Investigation Committee*, 372 U. S. 439, 546 (1963), it is quite apparent (1) that the State has the necessary interest in extirpating the traffic in illegal drugs, in forestalling assassination attempts on the President, and in preventing the community from being disrupted by violent disorders endangering both persons and property; and (2) that, based on the stories Branzburg and Caldwell wrote and Pappas' admitted conduct, the grand jury called these reporters as they would others—because it was likely that they could supply information to help the Government determine whether illegal conduct had occurred and, if it had, whether there was sufficient evidence to return an indictment.

Similar considerations dispose of the reporters' claims that preliminary to requiring their grand jury appearance, the State must show that a crime has been committed and that they possess relevant information not available from other sources, for only the grand jury itself can make this determination. The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. To this end it must call witnesses, in the manner best suited to perform its task. "When the grand jury is performing its investigatory function into a general problem area, . . . society's interest is best served by a thorough and extensive investigation." *Wood* v. *Georgia*, 370 U. S. 375, 392 (1962). A grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." *United States* v. *Stone*, 429 F. 2d 138, 140 (CA2 1970). Such an investigation

may be triggered by tips, rumors, evidence proferred by the prosecutor, or the personal knowledge of the grand jurors. *Costello* v. *United States, supra,* at 362. It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made:

> "It is impossible to conceive that in such cases the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who will be indicted." *Hale* v. *Henkel,* 201 U. S. 43, 65 (1906).

See also *Hendricks* v. *United States,* 223 U. S. 178 (1912); *Blair* v. *United States, supra,* at 282–283. We see no reason to hold that these reporters, any more than other citizens, should be excused from furnishing information that may help the grand jury in arriving at its initial determinations.

The privilege claimed here is conditional, not absolute; given the suggested preliminary showings and compelling need, the reporter would be required to testify. Presumably, such a rule would reduce the instances in which reporters could be required to appear, but predicting in advance when and in what circumstances they could be compelled to do so would be difficult. Such a rule would also have implications for the issuance of compulsory process to reporters at civil and criminal trials and at legislative hearings. If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem.[39] For them, it would appear that only an absolute privilege would suffice.

[39] "Under the case-by-case method of developing rules, it will be difficult for potential informants and reporters to predict whether testimony will be compelled since the decision will turn on the judge's

We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's priv-

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ad hoc assessment in different fact settings of 'importance' or 'relevance' in relation to the free press interest. A 'general' deterrent effect is likely to result. This type of effect stems from the vagueness of the tests and from the uncertainty attending their application. For example, if a reporter's information goes to the 'heart of the matter' in Situation X, another reporter and informant who subsequently are in Situation Y will not know if 'heart of the matter rule X' will be extended to them, and deterrence will thereby result. Leaving substantial discretion with judges to delineate those 'situations' in which rules of 'relevance' or 'importance' apply would therefore seem to undermine significantly the effectiveness of a reporter-informer privilege." Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L. J. 317, 341 (1970).

In re Grand Jury Witnesses, 322 F. Supp. 573 (ND Cal. 1970), illustrates the impact of this *ad hoc* approach. Here, the grand jury was as in *Caldwell*, investigating the Black Panther Party, and was "inquiring into matters which involve possible violations of Congressional acts passed to protect the person of the President (18 U. S. C. § 1751), to free him from threats (18 U. S. C. § 871), to protect our armed forces from unlawful interference (18 U. S. C. § 2387), conspiracy to commit the foregoing offenses (18 U. S. C. § 371), and related statutes prohibiting acts directed against the security of the government." *Id.*, at 577. The two witnesses, reporters for a Black Panther Party newspaper, were subpoenaed and given Fifth Amendment immunity against criminal prosecution, and they claimed a First Amendment journalists' privilege. The District Court order entered a protective order, allowing them to refuse to divulge confidential information until the Government demonstrated "a compelling and overriding national interest in requiring the testimony of [the witneses] which cannot be served by any alternative means." *Id.*, at 574. The Government claimed that it had information that the witnesses had associated with persons who had conspired to perform some of the criminal acts which the grand jury was investigating. The court held the Government had met its burden and ordered the witnesses to testify:

"The whole point of the investigation is to identify persons known to the [witnesses] who may have engaged in activities violative of

ilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. Cf. *In re Grand Jury Witnesses*, 322 F. Supp. 573, 574 (ND Cal. 1970). Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion:" *Lovell* v.

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the above indicated statutes, and also to ascertain the details of their alleged activities. All questions directed to such objectives of the investigation are unquestionably relevant, and any other evaluaton thereof by the Court, without knowledge of the facts before the Grand Jury would clearly constitute 'undue interference of the Court.'" *Id.*, at 577.

Another illustration is provided by *State* v. *Knops*, 49 Wis. 2d 647, 183 N. W. 2d 93 (1971), in which a grand jury was investigating the August 24, 1970, bombing of Sterling Hall on the University of Wisconsin Madison campus. On August 26, 1970, an "underground" newspaper; the Madison Kaleidoscope, printed a front-page story entitled "The Bombers Tell Why and What Next—Exclusive to the Kaleidoscope." An editor of the Kaleidoscope was subpoenaed, appeared, asserted his Fifth Amendment right against self-incrimination, was given immunity, and then pleaded that he had a First Amendment privilege against disclosing his confidential informants. The Wisconsin Supreme Court rejected his claim and upheld his contempt sentence: "[Appellant] faces five very narrow and specific questions, all of which are founded on information which he himself has already volunteered. The purpose of these questions is very clear. The need for answers to them is 'overriding,' to say the least. The need for these answers is nothing short of the public's need (and right) to protect itself from physical attack by apprehending the perpetrators of such attacks." 49 Wis. 2d, at 658, 183 N. W. 2d., at 98–99.

City of Griffin, 303 U. S. 444, 450, 452 (1938). See also *Mills* v. *Alabama*, 384 U. S. 214, 219 (1966); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111 (1943). The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury.[40]

In each instance where a reporter is subpoenaed to testify, the courts would also be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporters' appearance: Is there probable cause to believe a crime has been committed? Is it likely that the reporter has useful information gained in confidence? Could the grand jury obtain the information elsewhere? Is the official interest sufficient to outweigh the claimed privilege?

Thus, in the end, by considering whether enforcement of a particular law served a "compelling" governmental

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[40] Such a privilege might be claimed by groups that set up newspapers in order to engage in criminal activity and to therefore be insulated from grand jury inquiry, regardless of Fifth Amendment grants of immunity. It might appear that such "sham" newspapers would be easily distinguishable, yet the First Amendment ordinarily prohibits courts from inquiring into the content of expression, except in cases of obscenity or libel, and protects speech and publications regardless of their motivation, orthodoxy, truthfulness, timeliness, or taste. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269–270 (1964); *Kingsley Pictures Corp.* v. *Regents*, 360 U. S. 684, 689 (1959); *Winters* v. *New York*, 333 U. S. 507, 510 (1948); *Thomas* v. *Collins*, 323 U. S. 516, 537 (1945). By affording a privilege to some organs of communication but not to others, courts would inevitably be discriminating on the basis of content.

interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws. By requiring testimony from a reporter in investigations involving some crimes but not in others, they would be making a value judgment which a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. The task of judges, like other officials outside the legislative branch is not to make the law but to uphold it in accordance with their oaths.

At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to address the evil discerned and, equally important, to re-fashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to erect any bar to state courts responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.

In addition, there is much force in the pragmatic view that the press has at its disposal powerful mechanisms of communication and is far from helpless to protect itself from harassment or substantial harm. Furthermore, if what the newsmen urged in these cases is true—that law enforcement cannot hope to gain and may suffer from subpoenaing newsmen before grand juries—prosecutors will be loath to risk so much for so little. Thus, at the federal level the Attorney General has al-

ready fashioned a set of rules for federal officials in connection with subpoenaing members of the press to testify before grand juries or at criminal trials.[41] These rules are a major step in the direction petitioners desire to move. They may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and federal officials.

Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment.[42] Official harassment of the press undertaken not for purposes

[41] The "Guidelines for Subpoenas to the News Media" were first announced in a speech by the Attorney General on August 10, 1970, and then were expressed in Department of Justice Memo No. 692 (September 2, 1970), which was sent to all United States attorneys by the Assistant Attorney General in charge of the Criminal Division. The Guidelines state that "The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weight that limiting effect against the public interest to be served in the fair administration of justice" and that "The Department of Justice does not consider the press 'an investigative arm of the government.' Therefore, all reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press." The Guidelines provide for negotiations with the press and require the express authorization of the Attorney General for such subpoenas. The principles to be applied in authorizing such subpoenas are stated to be whether there is "sufficient reason to believe that the information sought [from the journalist] is essential to a successful investigation," and whether the Government has unsuccessfuly attempted to obtain the information from alternative non-press sources. The Guidelines provide, however, that in "emergencies and other unusual situations," subpoenas may be issued which do not exactly conform to the Guidelines.

[42] Cf. *Younger* v. *Harris*, 401 U. S. 37, 49, 53-54 (1971).

of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.

III

We turn, therefore, to the disposition of the cases before us. From what we have said, it necessarily follows that the decision in *United States* v. *Caldwell*, No. 70–57, must be reversed. If there is no First Amendment privilege to refuse to answer the relevant and material questions asked during a good-faith grand jury investigation, then it is *a fortiori* true that there is no privilege to refuse to appear before such a grand jury until the Government demonstrates some "compelling need" for a newsman's testimony. Other issues were urged upon us, but since they were not passed upon by the Court of Appeals, we decline to address them in the first instance.

The decisions in No. 70–85, *Branzburg* v. *Hayes* and *Branzburg* v. *Meigs* must be affirmed. Here, petitioner refused to answer questions that directly related to criminal conduct which he had observed and written about. The Kentucky Court of Appeals noted that marihuana is defined as a narcotic drug by statute, Ky. Rev. Stat. § 218.010 (14), and that unlicensed possession or compounding of it is a felony punishable by both fine and imprisonment. Ky. Rev. Stat. § 218.210. It held that petitioner "saw the commission of the statutory felonies of unlawful possession of marijuana and the unlawful conversion of it into hashish," in *Branzburg* v. *Pound*, 461 S. W. 2d, at 346. Petitioner may be presumed to have observed similar violations of the state narcotics laws during the research he did for the story which forms the basis of the subpoena in *Branzburg* v.

Meigs. In both cases, if what petitioner wrote was true, he had direct information to provide the grand jury concerning the commission of serious crimes.

The only question presented at the present time in *In the Matter of Paul Pappas*, No. 70–94, is whether petitioner Pappas must appear before the grand jury to testify pursuant to subpoena. The Massachusetts Supreme Judicial Court characterized the record in this case as "meager," and it is not clear what petitioner will be asked by the grand jury. It is not even clear that he will be asked to divulge information received in confidence. We affirm the decision of the Massachusetts Supreme Judicial Court and hold that petitioner must appear before the grand jury to answer the questions put to him, subject, of course, to the supervision of the presiding judge as to "the propriety, purposes, and scope of the grand jury inquiry and the pertinence of the probable testimony." — Mass. —, 266 N. E. 2d, at 303–304.

So ordered.

MR. JUSTICE DOUGLAS would reverse the judgments in *Branzburg* v. *Hayes* and *In the Matter of Pappas* for the reasons stated in his dissent in *United States* v. *Caldwell*, *post* —.

SUPREME COURT OF THE UNITED STATES

Nos. 70–85, 70–94, AND 70–57

Paul M. Branzburg, Petitioner, v. John P. Hayes, Judge, etc., et al. (70–85)	On Writ of Certiorari to the Court of Appeals of Kentucky.
In the Matter of Paul Pappas, Petitioner. (70–94)	On Writ of Certiorari to the Supreme Judicial Court of Massachusetts.
United States, Petitioner, v. Earl Caldwell. (70–57)	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 29, 1972]

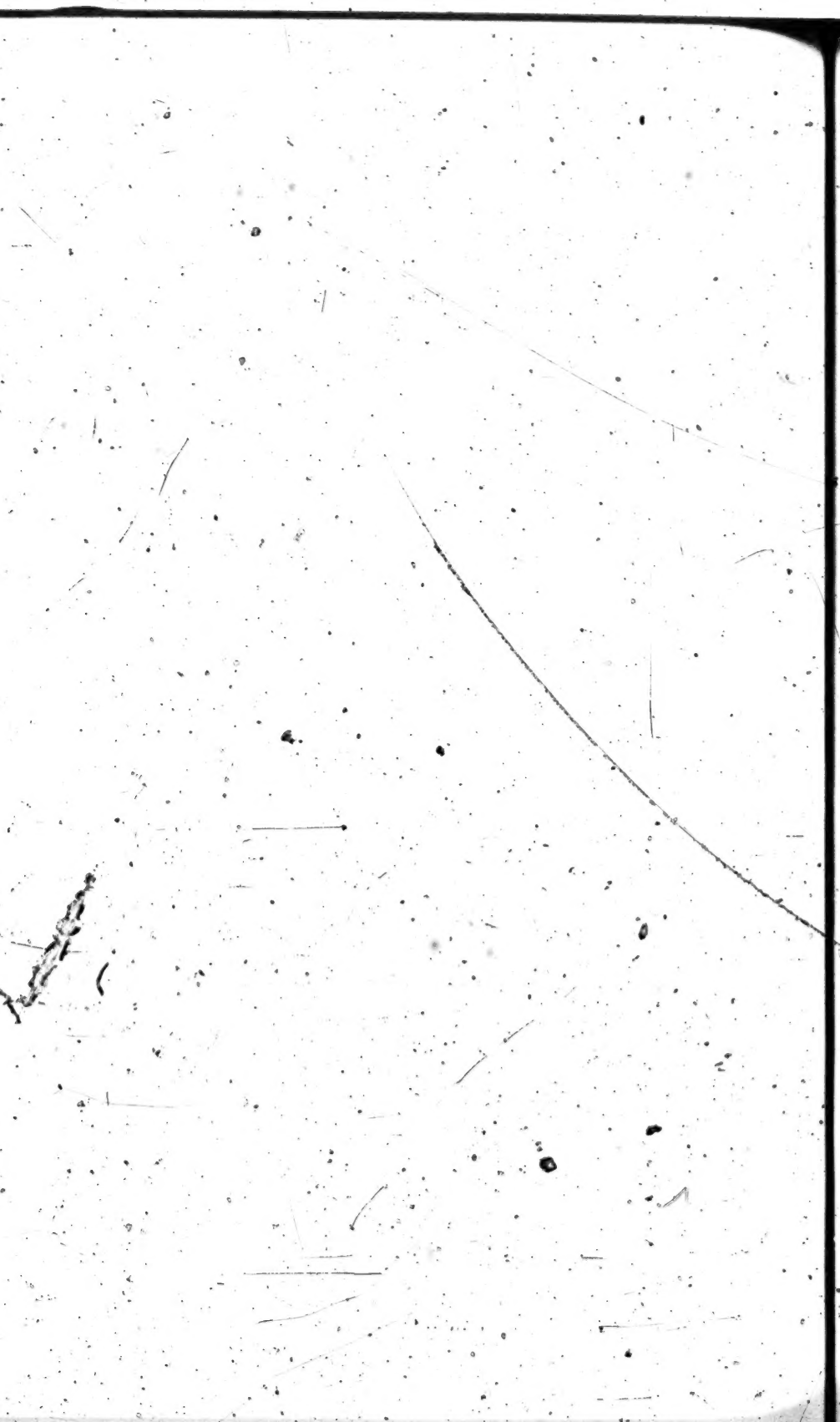
MR. JUSTICE POWELL, concurring in the opinion of the Court.

I add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding. The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. Certainly, we do not hold, as suggested in the dissenting opinion, that state and federal authorities are free to "annex" the news media as "an investigative arm of government." The solicitude repeatedly shown by this Court for First Amendment freedoms should be sufficient assurance against any such effort, even if one seriously believed that the media—properly free and untrammeled in the fullest sense of these terms—were not able to protect themselves.

As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.*

*It is to be remembered that Caldwell asserts a constitutional privilege not even to appear before the grand jury unless a court decides that the government has made a showing that meets the three preconditions specified in the dissenting opinion of MR. JUSTICE STEWART. To be sure, this would require a "balancing" of interests by the Court, but under circumstances and constraints significantly different from the balancing that will be appropriate under the Court's decision. The newsman witness, like all other witnesses, will have to appear; he will not be in a position to litigate at the threshold the State's very authority to subpoena him. Moreover, absent the constitutional preconditions that Caldwell and the dissenting opinion would impose as heavy burdens of proof to be carried by the State, the court—when called upon to protect a newsman from improper or prejudicial questioning—would be free to balance the competing interests on their merits in the particular case. The new constitutional rule endorsed by the dissenting opinion would, as a practical matter, defeat such a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated.

In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.



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[June 29, 1972]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society. The question whether a reporter has a constitutional right to a confidential relationship with his source is of first impression here, but the principles which should guide our decision are as basic as any to be found in the Constitution. While MR. JUSTICE POWELL's enigmatic concurring opinion gives some hope of a more flexible view in the future, the Court in these cases holds that a newsman has no First Amendment right to protect his sources when called before a grand jury. The Court thus invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government. Not

only will this decision impair performance of the press' constitutionally protected functions, but it will, I am convinced, in the long run, harm rather than help the adminstration of justice.

I respectfully dissent.

I

The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public. It is this basic concern that underlies the Constitution's protection of a free press, *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250; *New York Times* v. *Sullivan*, 376 U. S. 254, 269,[1] because the guarantee is "not for the benefit of the press so much as for the benefit of us all." *Time, Inc.* v. *Hill*, 385 U. S. 374, 389.[2]

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[1] We have often described the process of informing the public as the core purpose of the constitutional guarantee of free speech and a free press: See, *e. g.*, *Stromberg* v. *California*, 283 U. S. 359, 369; *De Jonge* v. *Oregon*, 299 U. S. 353, 365; *Smith* v. *California*, 361 U. S. 147, 153.

[2] As I see it, a reporter's right to protect his source is bottomed on the constitutional guarantee of a full flow of information to the public. A newsman's personal First Amendment rights or the associational rights of the newsman and the source are subsumed under that broad societal interest protected by the First Amendment. Obviously, we are not here concerned wtih the parochial personal concerns of particular newsmen or informants.

"The newsman-informer relationship is different from . . . other relationships whose confidentiality is protected by statute, such as the attorney-client and physician-patient relationships. In the case of other statutory privileges, the right of nondisclosure is granted to the person making the communication in order that he will be encouraged by strong assurances of confidentiality to seek such relationships which contribute to his personal well-being. The judgment is made that the interests of society will be served when individuals consult physicians and lawyers; the public interest is thus advanced by creating a zone of privacy that the individual can control. However, in the case of the reporter-informer relationship, society's interest is not in the welfare of the informant *per se*, but

Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised,[3] and a free press is thus indispensable to a free society. Not only does the press enhance personal self-fulfillment by providing the people with the widest possible range of fact and opinion, but it also is an incontestable precondition of self-government. The press "has been a mighty catalyst in awakening interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . . ." *Estes* v. *Texas*, 381 U. S. 532, 539; *Mills* v. *Alabama*, 384 U. S. 214, 219; *Grosjean, supra*, at 250. As private and public aggregations of power burgeon in size and the pressures for conformity necessarily mount, there is obviously a continuing need for an independent press to disseminate a robust variety of information and opinion through reportage, investigation and criticism, if we are to preserve our constitutional tradition of maximizing freedom of choice by encouraging diversity of expression.

A

In keeping with this tradition, we have held that the right to publish is central to the First Amendment and basic to the existence of constitutional democracy. *Grosjean, supra*, at 250; *New York Times, supra*, at 270.

A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free press guarantee would be severely curtailed if no protection whatever were afforded

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rather in creating conditions in which information possessed by news sources can reach public attention." Note, 80 Yale L. J. 317, 343 (1970) (footnotes omitted) (hereinafter "Yale Note").

[3] See generally Z. Chafee, Free Speech in the United States (1941); A. Meikeljohn, Free Speech and Its Relation to Self-Government (1948); T. Emerson, Toward a General Theory of the First Amendment (1963).

to the process by which news is assembled and disseminated. We have, therefore, recognized that there is a right to publish without prior governmental approval, *Near* v. *Minnesota*, 283 U. S. 697; *New York Times* v. *United States*, 403 U. S. 713, a right to distribute information, see, *e. g.*, *Lovell* v. *Griffin*, 303 U. S. 444, 452; *Marsh* v. *Alabama*, 326 U. S. 501; *Martin* v. *City of Struthers*, 319 U. S. 141; *Grosjean*, *supra*, and a right to receive printed matter, *Lamont* v. *Postmaster General*, 381 U. S. 301.

No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist. *Zemel* v. *Rusk*, 381 U. S. 1.[4] Note, The Right of the Press to Gather Information, 71 Col. L. Rev. 838 (1971). As Madison wrote: "A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both." 6 Writings of James Madison 398 (Hunt ed. 1906).

B

The right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source. This proposition follows as a matter of simple logic once three factual predicates are recognized: (1) newsmen require informants to gather news; (2) con-

[4] In *Zemel* v. *Rusk*, 381 U. S. 1, we held that the Secretary of State's denial of a passport for travel to Cuba did not violate a citizen's First Amendment rights. The rule was justified by the "weightiest considerations of national security" and we concluded that the "right to speak and publish does not carry with it the *unrestrained* right to gather information." *Id.*, at 16–17 (emphasis supplied). The necessary implication is that some right to gather information does exist.

fidentiality—the promise or understanding that names or certain aspects of communications will be kept off-the-record—is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) the existence of an unbridled subpoena power—the absence of a constitutional right protecting, in *any* way, a confidential relationship from compulsory process—will either deter sources from divulging information or deter reporters from gathering and publishing information.

It is obvious that informants are necessary to the news-gathering process as we know it today. If it is to perform its constitutional mission, the press must do far more than merely print public statements or publish prepared handouts. Familiarity with the people and circumstances involved in the myriad background activities that result in the final product called "news" is vital to complete and responsible journalism, unless the press is to be a captive mouthpiece of "newsmakers." [5]

It is equally obvious that the promise of confidential-

[5] In *Caldwell* v. *United States*, 434 F. 2d 1081, the Government claimed that Caldwell need not maintain a confidential relationship with members of the Black Panther Party and provide independent reporting of their activities, since the Party and its leaders could issue statements on their own. But as the Court of Appeals for the Ninth Circuit correctly observed:

"it is not enough that Black Panther press releases and public addresses by Panther leaders may continue unabated in the wake of subpoenas such as the one here in question. It is not enough that the public's knowledge of groups such as the Black Panthers should be confined to their deliberate public pronouncements or distant news accounts of their occasional dramatic forays into the public view. The need for an untrammeled press takes on special urgency in times of widespread protest and dissent. In such times the First Amendment protections exist to maintain communication with dissenting groups and to provide the public with a wide range of information about the nature of protest and heterodoxy. See, *e. g., Associated Press* v. *United States*, 326 U. S. 1, 20 (1945); *Thornhill* v. *Alabama*, 310 U. S. 88, 102 (1940)." *Id.*, at 1084–1085.

ity may be a necessary prerequisite to a productive relationship between a newsman and his informants. An officeholder may fear his superior; a member of the bureaucracy, his associates; a dissident, the scorn of majority opinion. All may have information valuable to the public discourse, yet each may be willing to relate that information only in confidence to a reporter whom he trusts, either because of excessive caution or because of a reasonable fear of reprisals or censure for unorthodox views. The First Amendment concern must not be with the motives of any particular news source, but rather with the conditions in which informants of all shades of the spectrum may make information available through the press to the public. Cf. *Talley* v. *California*, 362 U. S. 60, 65; *Bates* v. *City of Little Rock*, 361 U. S. 147; *NAACP* v. *Alabama*, 357 U. S. 449.[6]

In *Caldwell*, the District Court found that "confidential relationships . . . are commonly developed and maintained by professional journalists, and are indispensable to their work of gathering, analyzing and publishing news."[7] Commentators and individual reporters have repeatedly noted the importance of confidentiality.[8]

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[6] As we observed in *Talley* v. *California*, 362 U. S. 60, "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind . . . . Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts . . . . Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes." *Id.*, at 64–65. And in *Lamont* v. *Postmaster General*, 381 U. S. 301, we recognized the importance to First Amendment values of the right to receive information anonymously.

[7] *Application of Caldwell*, 311 F. Supp. 358, 361.

[8] See, *e. g.*, F. Chalmers, A Gentleman of the Press: The Biography of Colonel John Bayne MacLean 74–75 (1969); H. Klurfield, Behind

And surveys among reporters and editors indicate that the promise of nondisclosure is necessary for many types of news-gathering.[9]

Finally, and most important, when governmental officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it, because uncertainty about exercise of the power will lead to "self-censorship." *Smith* v. *California*, 361 U. S. 147, 149–154; *New York Times* v. *Sullivan*, 376 U. S. 254, 279. The uncertainty arises, of course, because the judiciary has traditionally imposed virtually no limitations on the grand jury's broad investigatory powers. See Antell, The Modern Grand Jury: Benighted Supergovernment, 51 A. B. A. J. (1965). See also Part II, *infra*.

After today's decision, the potential informant can never be sure that his identity or off-the-record communications will not subsequently be revealed through the compelled testimony of a newsman. A public

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the Lines: The World of Drew Pearson 50, 52–55 (1968); A. Krock, Memoirs: Sixty Years on the Firing Line 181, 184–185 (1968); E. Larsen, First with the Truth 22–23 (1968); R. Ottley, The Lonely Warrior—The Life and Times of Robert S. Abbott 143–145 (1955); C. L. Sulzberger, A Long Row of Candles, Memoirs and Diaries 24, 241 (1969).

As Walter Cronkite, a network television reporter, said in an affidavit in *Caldwell*: "In doing my work, I (and those who assist me) depend constantly on information, ideas, leads and opinions received in confidence. Such material is essential in digging out newsworthy facts and equally important in assessing the importance and analyzing the significance of public events."

[9] See Guest & Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources, 64 Nw. L. Rev. 18 (1969); Blasi, Press Subpoenas: An Empirical and Legal Analysis, Study Report of the Reporters' Committee on Freedom of the Press 20–29 (1972) (hereinafter, "Blasi").

spirited person inside government, who is not implicated in any crime, will now be fearful of revealing corruption or other governmental wrong-doing, because he will now know he can subsequently be identified by use of compulsory process. The potential source must, therefore, choose between risking exposure by giving information or avoiding the risk by remaining silent.

The reporter must speculate about whether contact with a controversial source or publication of controversial material will lead to a subpoena. In the event of a subpoena, under today's decision, the newsman will know that he must choose between being punished for contempt if he refuses to testify, or violating his profession's ethics [10] and impairing his resourcefulness as a reporter if he discloses confidential information.[11]

Again, the common sense understanding that such deterrence will occur is buttressed by concrete evidence. The existence of deterrent effects through fear and self-censorship was impressively developed in the District Court in *Caldwell*.[12] Individual reporters [13] and commentators [14] have noted such effects. Surveys have

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[10] The American Newspaper Guild has adopted the following rule as part of the newsman's code of ethics: "Newspaper men shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigative bodies." G. Bird and F. Mervin, The Newspaper and Society 567 (1942).

[11] Obviously if a newsman does not honor a confidence he will have difficulty establishing other confidential relationships necessary for obtaining information in the future. See Siebert and Ryniker, Editor and Publisher, September 1, 1934, 36–37.

[12] The court found that "compelled disclosure of information received by a journalist within the scope of . . . confidential relationships jeopardizes those relationships and thereby impairs the journalist's ability to gather, analyze and publish news." *Application of Caldwell*, 311 F. Supp. 358, 361.

[13] See n. 8, *supra*.

[14] Recent commentary is nearly unanimous in urging either an

verified that an unbridled subpoena power will substantially impair the flow of news to the public, especially in sensitive areas involving governmental officials, financial affairs, political figures, dissidents, or minority groups that require in-depth, investigative reporting.[15] And the Justice Department has recognized that "compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights."[16] *No* evidence contradicting the existence of such deterrent effects was offered at the trials or in the briefs here by the petitioners in *Caldwell* or by the respondents in *Branzburg* and *Pappas*.

The impairment of the flow of news cannot, of course, be proven with scientific precision, as the Court seems to demand. Obviously, not every news-gathering relationship requires confidentiality. And it is difficult to pinpoint precisely how may relationships do require a promise or understanding of nondisclosure. But we have

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absolute or qualified newsman's privilege. See, *e. g.*, Goldstein, Newsmen and Their Confidential Sources, New Republic, March 21, 1970, 13–14; Note, 80 Yale L. J. 317 (1970); Note, 46 N. Y. U. L. Rev. 617 (1971); Nelson, The Newsmen's Privilege Against Disclosure of Confidential Sources and Information, 24 Vand. L. Rev. 667 (1971); Note, 71 Col. L. Rev. 838 (1971); Comment, 4 Journal of Law Reform 85 (1971); Comment, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 119 (1970); Comment, 58 Calif. L. Rev. 1198 (1970). But see the Court's opinion, *ante*, at 24, n. 29. And see generally articles collected in Yale Note, n. 2.

Recent decisions are in conflict both as to the importance of the deterrent effects and, *a fortiori*, as to the existence of a constitutional right to a confidential reporter-source relationship. See the Court's opinion, *ante*, at 20, and cases collected in Yale Note, at 318, n. 6–7.

[15] See Blasi 6–71; Guest and Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources, 64 Nw. L. Rev. 18, 43–50 (1969).

[16] Department of Justice Memo No. 692, September 2, 1970.

never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist; we have never before required proof of the exact number of people potentially affected by governmental action, who would actually be dissuaded from engaging in First Amendment activity.

Rather, on the basis of common sense and available information, we have asked, often implicitly, (1) whether there was a rational connection between the cause (the governmental action) and the effect (the deterrence or impairment of First Amendment activity) and (2) whether the effect would occur with some regularity, *i. e.*, would not be *de minimus*. See, *e. g.*, *Grosjean*, *supra*, at 244–245; *Burstyn* v. *Wilson*, 343 U. S. 495, 503; *Sweezy* v. *New Hampshire*, 354 U. S. 234, 248; *NAACP* v. *Alabama*, 357 U. S. 449, 461–466; *Smith* v. *California*, 361 U. S. 147, 150–154; *Bates* v. *City of Little Rock*, 361 U. S. 516, 523–524; *Talley* v. *California*, 362 U. S. 60, 64–65; *Shelton* v. *Tucker*, 364 U. S. 479, 485–486; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278; 286; *NAACP* v. *Button*, 371 U. S. 415, 431–438; *Gibson* v. *Florida Legislative Investigative Committee*, 372 U. S. 539, 555–557; *New York Times* v. *Sullivan*, 376 U. S. 254, 277–278; *Freedman* v. *Maryland*, 380 U. S. 51, 59; *DeGregory* v. *New Hampshire Attorney General*, 383 U. S. 825; *Elfbrandt* v. *Russell*, 384 U. S. 11, 16–19. And, in making this determination, we have shown a special solicitude towards the "indispensable liberties" protected by the First Amendment, *NAACP* v. *Alabama*, 371 U. S., at 461; *Bantam Books Inc.* v. *Sullivan*, 372 U. S. 58, 66, for "freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle gov-

ernment interference." *Bates, supra,* at 523.[17] Once this threshold inquiry has been satisfied, we have then examined the competing interests in determining whether there is an unconstitutional infringement of First Amendment freedoms.

For example, in *NAACP* v. *Alabama,* 357 U. S. 449, we found that compelled disclosure of the names of those in Alabama who belonged to the NAACP "is likely to affect adversely the ability [of the NAACP] and its members to pursue their beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." *Id.,* at 463. In *Talley, supra,* we held invalid a city ordinance which forbade circulation of any handbill that did not have the distributor's name on it, for there was "no doubt that such an identification procedure would tend to restrict freedom to distribute information and thereby freedom of expression." *Id.,* at 64–65. And in *Burstyn, supra,* we found deterrence of First Amendment activity inherent in a censor's power to exercise unbridled discretion under an overbroad statute. *Id.,* at 503.

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[17] Although, as the Court points out, we have held that the press is not free from the requirements of the National Labor Relations Act, the Fair Labor Standards Act, the antitrust laws or nondiscriminatory taxation, *ante,* at 17, these decisions were concerned "only with restraints on certain business or commercial practices of the press." *Citizen Publishing Co.* v. *United States,* 394 U. S. 131, 139. And due weight was given to First Amendment interests. For example, the "First Amendment far from providing an argument against application of the Sherman Act . . . provides powerful reasons to the contrary." *Associated Press* v. *United States,* 326 U. S. 1, 20.

Surely the analogous claim of deterrence here is as securely grounded in evidence and common sense as the claims in the cases cited above, although the Court calls the claim "speculative." See *ante*, at 28. The deterrence may not occur in every confidential relationship between a reporter and his source.[18] But it will certainly occur in certain types of relationships involving sensitive and controversial matters. And such relationships are vital to the free flow of information.

To require any greater burden of proof is to shirk our duty to protect values securely embedded in the Constitution. We cannot await an unequivocal—and therefore unattainable—imprimatur from empirical studies.[19] We can and must accept the evidence developed in the record, and elsewhere, that overwhelmingly supports the premise that deterrence will occur with regularity in important types of news-gathering relationships.[20]

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[18] The fact that *some* informants will not be deterred from giving information by the prospect of the unbridled exercise of the subpoena power only means that there will not *always* be a conflict between the grand jury's inquiry and the protection of First Amendment activities. But even if the percentage of such informants is relatively large compared to the total "universe" of potential informants, there will remain a large number of people in "absolute" terms who *will* be deterred, and the flow of news through mass circulation newspapers and electronic media will inevitably be impaired.

[19] Empirical studies, after all, can only provide facts. It is the duty of courts to give legal significance to facts; and it is the special duty of this Court to understand the constitutional significance of facts. We must often proceed in a state of less than perfect knowledge, either because the facts are murky or the methodology used in obtaining the facts is open to question. It is then that we must look to the Constitution for the values that inform our presumptions. And the importance to our society of the full flow of information to the public has buttressed this Court's historic presumption in favor of First Amendment values.

[20] See, *e. g.*, the uncontradicted evidence presented in affidavits from newsmen in *Caldwell*, Appendix to No. 70–57, at 22–61 (statements from Gerald Fraser, Thomas Johnson, John Kifner, Timothy

Thus, we cannot escape the conclusion that when neither the reporter nor his source can rely on the shield of confidentiality against unrestrained use of the grand jury's subpoena power, valuable information will not be published and the public dialogue will inevitably be impoverished.

II

Posed against the First Amendment's protection of the newsman's confidential relationships in these cases is society's interest in the use of the grand jury to administer justice fairly and effectively. The grand jury serves two important functions: "to examine into the commission of crimes" and "to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will." *Hale* v. *Henkel*, 201 U. S. 43, 59. And to perform these functions the grand jury must have available to it every man's relevant evidence. See *Blair* v. *United States*, 250 U. S. 273, 281; *Blackmer* v. *United States*, 284 U. S. 421, 438.

Yet the longstanding rule making every person's evidence available to the grand jury is not absolute. The rule has been limited by the Fifth Amendment,[21] the Fourth Amendment,[22] and the evidentiary privileges of the common law.[23] So it was that in *Blair*, *supra*, after

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Knight, Nicholas Proffitt, Anthony Ripley, Wallace Turner, Gilbert Noble, Anthony Lukas, Martin Arnold, David Burnham, Jon Lowell, Frank Morgan, Min Yee, Walter Cronkite, Eric Sevareid, Mike Wallace, Dan Rather, Marvin Kalb).

[21] See *Blau* v. *United States*, 340 U. S. 159; *Quinn* v. *United States*, 349 U. S. 155; *Curcio* v. *United States*, 354 U. S. 118; *Malloy* v. *Hogan*, 378 U. S. 1.

[22] See *Silverthrone Lumber Co.* v. *United States*, 251 U. S. 385.

[23] See Committee on Rules of Practice and Procedure of Judicial Conference of the United States, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates (1971); 8 J. Wigmore, Evidence §§ 2290–2391 (McNaughten ed. 1961).

recognizing that the right against compulsory self-incrimination prohibited certain inquiries, the Court noted that "some confidential matters are shielded from considerations of policy, and perhaps in other cases for *special reasons* a witness may be excused from telling all he knows." *Id.*, at 281 (emphasis supplied). And in *United States* v. *Bryan*, 393 U. S. 323, the Court observed that any exemption from the duty to testify before the grand jury "presupposes a very real interest to be protected." *Id.*, at 331–332.

Such an interest must surely be the First Amendment protection of a confidential relationship that I have discussed above in Part I. As noted there, this protection does not exist for the purely private interests of the newsman or his informant, nor even, at bottom, for the First Amendment interests of either partner in the newsgathering relationship.[24] Rather it functions to insure nothing less than democratic decisionmaking through the free flow of information to the public, and it serves, thereby, to honor the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times* v. *Sullivan*, 376 U. S., at 270.

In striking the proper balance between the public interest in the efficient administration of justice and the First Amendment guarantee of the fullest flow of information, we must begin with the basic proposition that because of their "delicate and vulnerable" nature, *NAACP* v. *Button*, 371 U. S. 415, 433, and their transcendent importance for the just functioning of our society, First Amendment rights require special safeguards.

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[24] Although there is a longstanding presumption against creation of common law testimonial privileges, *United States* v. *Bryan*, 339 U. S. 323, 331, these privileges are grounded in an "individual interest which has been found . . . to outweigh the public interest in the search for truth" rather than in the broad public concerns which inform the First Amendment. *Id.*, at 331.

A

This Court has erected such safeguards when government, by legislative investigation or other investigative means, has attempted to pierce the shield of privacy inherent in freedom of association.[25] In no previous case have we considered the extent to which the First Amendment limits the grand jury subpoena power. But the Court has said that the "Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable searches and seizures. Nor can the First Amendment freedoms of speech, press . . . or political speech and association be abridged." *Watkins* v. *United States*, 354 U. S. 178, 188. And in *Sweezy* v. *New Hampshire*, 354 U. S. 234, it was stated: "it is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas." *Id.*, at 245 (plurality opinion).

The established method of "carefully" circumscribing investigative powers is to place a heavy burden of justification on government officials when First Amendment rights are impaired. The decisions of this Court have "consistently held that only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP* v. *Button*, 371 U. S.

[25] The protection of information from compelled disclosure for broad purposes of public policy has been recognized in decisions involving police informers, see *Roviaro* v. *United States*, 353 U. S. 53, *United States* v. *Ventresca*, 380 U. S. 102, 108, *Aguilar* v. *Texas*, 378 U. S. 108, 114, *McCray* v. *Illinois*, 386 U. S. 300, and military and state secrets, *United States* v. *Reynolds*, 345 U. S. 1.

415, 438. And "it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the state *show a substantial relation between the information sought and a subject of overriding and compelling state interest.*" *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539, 546 (emphasis supplied). See also *DeGregory* v. *Attorney General of New Hampshire*, 383 U. S. 825; *NAACP* v. *Alabama*, 357 U. S. 449; *Sweezy, supra; Watkins, supra.*

Thus, when an investigation impinges on First Amendment rights, the government must not only show that the inquiry is of "compelling and overriding importance" but it must also "convincingly" demonstrate that the investigation is "substantially related" to the information sought.

Governmental officials must, therefore, demonstrate that the information sought is *clearly* relevant to a *precisely* defined subject of governmental inquiry. *Watkins, supra; Sweezy, supra.*[26] They must demonstrate that it is reasonable to think the witness in question has that information. *Sweezy, supra; Gibson, supra.*[27] And

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[26] As we said in *Watkins* v. *United States*, 354 U. S. 178,

"[W]hen First Amendment rights are threatened, the delegation of power to the [legislative] committee must be clearly revealed in its charter. . . . It is the responsibility of the Congress . . . to insure that compulsory process is used only in furtherance of a legislative purpose. That requires that the instructions to an investigating committee spell out the group's jurisdiction and purpose with sufficient particularity. . . . The more vague the committee's charter is, the greater becomes the possibility that the committee's specific actions are not in conformity with the will of the parent House of Congress." *Id.*, at 198–201.

[27] We noted in *Sweezy* v. *New Hampshire*, 354 U. S. 234:

"The State Supreme Court itself recognized that there was a weakness in its conclusion that the menace of forcible overthrow of the

they must show that there is not any means of obtaining the information less destructive of First Amendment liberties. *Shelton* v. *Tucker*, 364 U. S. 479, 488; *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293, 296–297.[28]

These requirements, which we have recognized in decisions involving legislative and executive investigations, serve established policies reflected in numerous First Amendment decisions arising in other contexts. The requirements militate against vague investigations which, like vague laws, create uncertainty and needlessly discourage First Amendment activity.[29] They also insure that a legitimate governmental purpose will not be pursued by means that "broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton*, *supra*, at 488.[30] As we said in *Gibson*, *supra*, "Of course, a legislative investigation—as any investiga-

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government, justified sacrificing constitutional rights. There was a missing link in the chain of reasoning. The syllogism was not complete. *There was nothing to connect the questioning of the petitioner with this fundamental interest of the state.*" *Id.*, at 251 (emphasis supplied).

[28] See generally Note, Less Drastic Means and the First Amendment, 78 Yale L. J. 464 (1969).

[29] See *Watkins*, *supra*, at 208–209. See generally *Baggett* v. *Bullitt*, 377 U. S. 360, 372; *Speiser* v. *Randall*, 357 U. S. 513, 526; *Ashton* v. *Kentucky*, 384 U. S. 195, 200–201; *Dombrowski* v. *Pfister*, 380 U. S. 479, 486; *Smith* v. *California*, 361 U. S. 147, 150–152 (1959); *Winters* v. *New York*, 333 U. S. 507; *Stromberg* v. *California*, 283 U. S. 359, 369. See also Note, The Chilling Effect in Constitutional Law, 69 Col. L. Rev. 808 (1969).

[30] See generally *Zwickler* v. *Koota*, 389 U. S. 241, 249–250, and cases cited therein; *Coates* v. *Cincinnati*, 402 U. S. 611, 616; *Cantwell* v. *Connecticut*, 310 U. S. 296, 307; *De Jonge* v. *Oregon*, 299 U. S. 353, 364–365; *Schneider* v. *State*, 308 U. S. 147, 164; *Cox* v. *Louisiana*, 379 U. S. 559, 562–564 (1965). Cf. *NAACP* v. *Button*, 371 U. S. 415, 438 (1963). See also Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970).

tion—must proceed 'step by step,' . . . but step by step or in totality, an adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights." *Id.*, at 557.

I believe the safeguards developed in our decisions involving governmental investigations must apply to the grand jury inquiries in these cases. Surely the function of the grand jury to aid in the enforcement of the law is no more important than the function of the legislature, and its committees, to make the law. We have long recognized the value of the role played by legislative investigations, see, *e. g.*, *United States* v. *Rumely*, 345 U. S. 41, 43; *Barenblatt* v. *United States*, 360 U. S. 109, 111–112, for the "power of Congress to conduct investigations is 'broad . . . [encompassing] surveys of defects in our social, economic or political system for the purpose of enabling Congress to remedy them." *Watkins*, *supra*, at 187. Similarly, the associational rights of private individuals, which have been the prime focus of our First Amendment decisions in the investigative sphere, are hardly more important than the First Amendment rights of mass circulation newspapers and electronic media to disseminate ideas and information, and of the general public to receive them. Moreover, the vices of vagueness and overbreadth which legislative investigations may manifest are also exhibited by grand jury inquiries, since grand jury investigations are not limited in scope to specific criminal acts, see, *e. g.*, *Wilson* v. *United States*, 221 U. S. 361; *Hendricks* v. *United States*, 223 U. S. 178, 184, *United States* v. *Johnson*, 319 U. S. 503, and since standards of materiality and relevance are greatly relaxed. *Holt* v. *United States*, 218 U. S. 245; *United States* v. *Costello*, 350 U. S. 359.

See generally Note, The Grand Jury as an Investigatory Body, 74 Harv. L. Rev. 590, 591–592 (1961).[31] For, as the United States notes in its brief in *Caldwell*, the grand jury "need establish no factual basis for commencing an investigation, and can pursue rumors which further investigation may prove groundless."

Accordingly, when a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information which is clearly relevant to a specific probable violation of law;[32] (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.[33]

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[31] In addition, witnesses customarily are not allowed to object to questions on the grounds of materiality or relevance, since the scope of the grand jury inquiry is deemed to be of no concern to the witness. *Blair* v. *United States*, 417 F. 2d 384, cert. denied, 399 U. S. 935. Nor is counsel permitted to be present to aid a witness. See *In re Groban*, 352 U. S. 330.

See generally Younger, The Grand Jury Under Article III, 46 Crim. L. C. & P. S. 214 (1955); Note, 104 U. Pa. L. Rev. 429 (1955); Watts, Grand Jury: Sleeping Watchdog or Expensive Antique, 37 N. C. L. Rev. 290 (1959); Whyte, "Is the Grand Jury Necessary," 45 Va. L. Rev. 469 (1959); Note, 2 Col. L. and Soc. Prob. 58 (1965); Antell, The Modern Grand Jury: Benighted Supergovernment, 51 A. B. A. J. 153 (1965); Orfield, The Federal Grand Jury, 22 F. R. D. 343.

[32] The standard of proof employed by most grand juries, federal and State, is simply "probable cause" to believe that the accused has committed a crime. See Note, 1963 Wash. U. L. Q. 102; L. Hall *et al.*, Modern Criminal Procedure 793–794 (1969). Generally speaking, it is extremely difficult to challenge indictments on the ground that they are not supported by adequate or competent evidence. Cf. *Costello* v. *United States*, 350 U. S. 359; *Beck* v. *Washington*, 369 U. S. 541.

[33] Cf. *Garland* v. *Torre*, 259 F. 2d 545. The Second Circuit Court of Appeals declined to provide a testimonial privilege to a newsman

This is not to say that a grand jury could not issue a subpoena until such a showing were made, and it is not to say that a newsman would be in any way privileged to ignore any subpoena that was issued. Obviously, before the government's burden to make such a showing were triggered, the reporter would have to move to quash the subpoena, asserting the basis on which he considered the particular relationship a confidential one.

B

The crux of the Court's rejection of any newsman's privilege is its observation that only "where news sources themselves are implicated in crime or possess information *relevant* to the grand jury's task need they or the reporter be concerned about grand jury subpoenas." See *ante*, at 25 (emphasis supplied). But this is a most misleading construct. For it is obviously not true that the only persons about whom reporters will be forced to testify will be those "confidential informants involved in actual criminal conduct" and those having "information suggesting illegal conduct by others." See *ante*, at 25, 27. As noted above, given the grand jury's extraordinarily broad investigative powers and the weak standards of relevance and materiality that apply during such inquiries, reporters, if they have no testimonial privilege, will be called to give information about informants who have neither committed crimes nor have information

called to testify at a civil trial. But the court recognized a newsman's First Amendment right to a confidential relationship with his source and concluded: "It is to be noted that we are not dealing here with the use of judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality. . . . The question asked went to the heart of the plaintiff's claim." *Id.*, at 549-550 (citations omitted).

about crime. It is to avoid deterrence of such sources and thus to prevent needless injury to First Amendment values that I think the government must be required to show probable cause that the newsman has information which is clearly relevant to a specific probable violation of criminal law.[34]

Similarly, a reporter may have information from a confidential source which is "related" to the commission of crime, but the government may be able to obtain an indictment or otherwise achieve its purposes by subpoenaing persons other than the reporter. It is an obvious but important truism that when government aims have been fully served, there can be no legitimate reason to disrupt a confidential relationship between a reporter and his source. To do so would not aid the administration of justice and would only impair the flow of

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[34] If this requirement is not met, then the government will basically be allowed to undertake a "fishing expedition" at the expense of the press. Such general, exploratory investigations will be most damaging to confidential news-gathering relationships, since they will create great uncertainty in both reporters and their sources. The Court sanctions such explorations, by refusing to apply a meaningful "probable cause" requirement. See *ante*, at 35–36. As the Court states, a grand jury investigation "may be triggered by tips, rumors, evidence proferred by the prosecutor, or the personal knowledge of the grand jurors." *Ante*, at 36. It thereby invites government to try to annex the press as an investigative arm, since any time government wants to probe the relationships between the newsman and his source, it can, on virtually any pretext, convene a grand jury and compel the journalist to testify.

The Court fails to recognize that under the guise of "investigating crime" vindictive prosecutors can, using the broad powers of the grand jury which are, in effect, immune from judicial supervision, explore the newsman's sources at will, with no serious law enforcement purpose. The secrecy of grand jury proceedings affords little consolation to a news source; the prosecutor obviously will, in most cases, have knowledge of testimony given by grand jury witnesses.

information to the public. Thus, it is to avoid deterrence of such sources that I think the government must show that there are no alternative means for the grand jury to obtain the information sought.

Both the "probable cause" and "alternative means" requirements would thus serve the vital function of mediating between the public interest in the administration of justice and the constitutional protection of the full flow of information. These requirements would avoid a direct conflict between these competing concerns, and they would generally provide adequate protection for newsmen. See Part III, *infra*.[35] No doubt the courts would be required to make some delicate judgments in working out this accommodation. But that, after all, is the function of courts of law. Better such judgments, however difficult, than the simplistic and stultifying absolutism adopted by the Court in denying any force to the First Amendment in these cases.[36]

The error in the Court's absolute rejection of First Amendment interests in these cases seems to me to be most profound. For in the name of advancing the administration of justice, the Court's decision, I think, will only impair the achievement of that goal. People entrusted with law enforcement responsibility, no less than private citizens, need general information relating to controversial social problems. Obviously, press reports have great value to government, even when the newsman cannot be compelled to testify before a grand

[35] We need not, therefore, reach the question of whether government's interest in these cases is "overriding and compelling." I do not, however, believe, as the Court does, that *all* grand jury investigations automatically would override the newsman's testimonial privilege.

[36] The disclaimers in MR. JUSTICE POWELL'S concurring opinion leave room for the hope that in some future case the Court may take a less absolute position in this area.

jury. The sad paradox of the Court's position is that when a grand jury may exercise an unbridled subpoena power, and sources involved in sensitive matters become fearful of disclosing information, the newsman will not only cease to be a useful grand jury witness; he will cease to investigate and publish information about issues of public import. I cannot subscribe to such an anomalous result, for, in my view, the interests protected by the First Amendment are not antagonistic to the administration of justice. Rather, they can, in the long run, only be complementary, and for that reason must be given great "breathing space." *NAACP* v. *Button*, 371 U. S. 415, 433.

III

In deciding what protection should be given to information a reporter receives in confidence from a news source, the Court of Appeals for the Ninth Circuit affirmed the holding of the District Court that the grand jury power of testimonial compulsion must not be exercised in a manner likely to impair First Amendment interests "until there has been a clear showing of compelling and overriding national interest that cannot be served by alternative means." *Caldwell* v. *United States*, 434 F. 2d 1081, 1086. It approved the request of respondent Caldwell for specification by the government of the "subject, direction or scope of the grand jury inquiry." *Id.*, at 1085. And it held that in the circumstances of this case Caldwell need not divulge confidential information.

I think this decision was correct. On the record before us the United States has not met the burden which I think the appropriate newsman's privilege should require.

In affidavits before the District Court, the United States said it was investigating possible violations of 18

U. S. C. § 871 (threats against the President), 18 U. S. C. § 1751 (assassination, attempts to assassinate, conspiracy to assassinate the President), 18 U. S. C. § 231 (civil disorders), 18 U. S. C. § 1201 (interstate travel to incite a riot), 18 U. S. C. § 1341 (mail fraud and swindles) and other crimes which were not specified. But, with one exception, there has been no factual showing in this case of the probable commission of, or of attempts to commit, any crimes.[37] The single exception relates to the allegation that a Black Panther Party leader, David Hilliard, violated 18 U. S. C. § 871 during the course of a speech in November 1969. But Caldwell was subpoenaed two months after an indictment was returned against Hilliard, and that charge could not, subsequent to the indictment, be investigated by a grand jury. See *In re National Window Glass Workers*, 287 Fed. 219; *United States* v. *Dardi*, 330 F. 2d 316, 336.[38] Furthermore, the record before us does not show that Caldwell probably had any information about the violation of any other

[37] See Blasi, at 61 ff.

[38] After Caldwell was first subpoenaed to appear before the grand jury, the Government did undertake, by affidavits, to "set forth facts indicating the general nature of the grand jury's investigation [and] witness Earl Caldwell's possession of information relevant to this general inquiry." In detailing the basis for the belief that a crime had probably been committed, the government simply asserted that certain actions had previously been taken *by other grand juries, and by Government counsel*, with respect to certain members of the Black Panther Party (*i. e.*, immunity grants for certain Black Panthers were sought; the Government moved to compel party members to testify before grand juries; and contempt citations were sought when party members refused to testify). No facts were asserted suggesting the actual commission of crime. The exception, as noted, involved David Hilliard's speech and its republication in the party newspaper, "The Black Panther," for which Hilliard had been indicted before Caldwell was subpoenaed.

federal crimes,[39] or that alternative means of obtaining the desired information were pursued.[40]

In the *Caldwell* case, the Court of Appeals further found that Caldwell's confidential relationship with the leaders of the Black Panther Party would be impaired if he appeared before the grand jury at all to answer questions, even though not privileged. *Caldwell* v. *United States*, 434 F. 2d, at 1088. On the particular facts before it,[41] the Court concluded that the very

[39] In its affidavits, the government placed primary reliance on certain articles published by Caldwell in the New York Times during 1969 (on June 15, July 20, July 22, July 27, and December 14). On December 14, 1969, Caldwell wrote:

"We are special, Mr. Hilliard said recently We advocate the very direct overthrow of the Government by way of force and violence. By picking up guns and moving against it because we recognize it as being oppressive and in recognizing that we know that the only solution to it is armed struggle.

"In their role as the vanguard in a revolutionary struggle, the Panthers have picked up guns.

"Last week two of their leaders were killed during the police raid on one of their offices in Chicago. And in Los Angeles a few days earlier, three officers and three Panthers were wounded in a similar shooting incident. In these and in some other raids, the police have found caches of weapons, including high-powered rifles."

In my view, this should be read as indicating that Caldwell had interviewed Panther leaders. It does not indicates that he *probably* had knowledge of the crimes being investigated by the Government. And, to repeat, to the extent it does relate to Hilliard's threat, an indictment had already been brought on that matter. The other articles merely demonstrate that Black Panther Party leaders had told Caldwell their ideological beliefs—beliefs which were readily available to the Government through other sources, like the party newspaper.

[40] The Government did not attempt to show that means less impinging upon First Amendment interests had been pursued.

[41] In an affidavit filed with the District Court, Caldwell stated:

"I began covering and writing articles about the Black Panthers

appearance by Caldwell before the grand jury would jeopardize his relationship with his sources, leading to

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almost from the time of their inception, and I myself found that in those first months that they were very brief and reluctant to discuss any substantive matter with me. However, as they realized I could be trusted and that my sole purpose was to collect my information and present it objectively in the newspaper and that I had no other motive, I found that not only were the party leaders available for in-depth interviews but also the rank and file members were cooperative in aiding me in the newspaper stories that I wanted to do. During the time that I have been covering the party, I have noticed other newspapermen representing legitimate organizations in the news media being turned away because they were not known and trusted by the party leadership.

"As a result of the relationship that I have developed, I have been able to write lengthy stories about the Panthers that have appeared in The New York Times and have been of such a nature that other reporters who have not known the Panthers have not been able to write. Many of these stories have appeared in up to 50 or 60 other newspapers around the country.

"The Black Panther Party's method of operation with regard to members of the press is significantly different from that of other organizations. For instance, press credentials are not recognized as being of any significance. In addition, interviews are not normally designated as being 'backgrounders' or 'off the record' or 'for publication' or 'on the record.' Because no substantive interviews are given until a relationship of trust and confidence is developed between the Black Panther Party members and a reporter, statements are rarely made to such reporters on an expressed 'on' and 'off' the record basis. Instead, an understanding is developed over a period of time between the Black Panther Party members and the reporter as to matters which the Black Panther Party wishes to disclose for publications and those matters which are given in confidence. . . . Indeed, if I am forced to appear in secret grand jury proceedings, my appearance alone would be interpreted by the Black Panthers and other dissident groups as a possible disclosure of confidences and trusts and would similarly destroy my effectiveness as a newspaperman."

The Government did not contradict this affidavit.

a severance of the news-gathering relationship and impairment of the flow of news to the public: [42]

"Appellant asserted in affidavit that there is nothing to which he could testify (beyond that which he has already made public and for which, therefore, his appearance is unnecessary) that is not protected by the District Court's order. If this is true—and the Government apparently has not believed it necessary to dispute it—appellant's response to the subpoena would be a barren performance—one of no benefit to the Grand Jury. To destroy appellant's capacity as news gatherer for such a return hardly makes sense. Since the cost to the public of excusing his attendance is so slight, it may be said that there is here no public interest of real substance in competition with the First Amendment freedoms that are jeopardized.

"If any competing public interest is ever to arise in a case such as this (where First Amendment liberties are threatened by mere appearance at a Grand Jury investigation) it will be on an occasion in

[42] "Militant groups might very understandably fear that, under the pressure of examination before a Grand Jury, the witness may fail to protect their confidences . . . . The Government characterizes this anticipated loss of communication as Black Panther reprisal. . . . But it is not an extortionate threat that we face. It is a human reaction as reasonable to expect as that a client will leave a lawyer when his confidence is shaken. . . . As the Government points out, loss of such a sensitive news source can also result from its reaction to indiscreet or unfavorable reporting or from a reporter's association with Government agents or persons disapproved of by the news source. Loss in such a case, however, results from an exercise of the choice and perogative of a free press. It is not the result of Government compulsion." *Caldwell* v. *United States*, 434 F. 2d 1088.

which the witness, armed with his privilege, can still serve a useful purpose before the Grand Jury. Considering the scope of the privilege embodied in the protective order, these occasions would seem to be unusual. It is not asking too much of the Government to show that such an occasion is presented here." *Caldwell, supra,* at 1089.

I think this ruling was also correct in light of the particularized circumstances of the *Caldwell* case. Obviously, only in very rare circumstances would a confidential relationship between a reporter and his source be so sensitive that mere appearance before the grand jury by the newsman would substantially impair his news-gathering function. But in this case, the reporter made out a prima facie case that the flow of news to the public would be curtailed. And he stated, without contradiction, that the only nonconfidential material about which he could testify was already printed in his newspaper articles.[43] Since the United States has not attempted to refute this assertion, the appearance of Caldwell would, on these facts, indeed be a "barren performance." But *this* aspect of the *Caldwell* judgment I would confine to its own facts. As the Court of Appeals appropriately observed: "The rule of this case is a narrow one . . . ." *Caldwell, supra,* at 1090.

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[43] Caldwell stated in his affidavit filed with the District Court, see n. 40, *supra:*

"It would be virtually impossible for me to recall whether any particular matter disclosed to me by members of the Black Panther Party since January 1, 1969, was based on an understanding that it would or would not be confidential. Generally, those matters which were made on a nonconfidential or 'for publication' basis have been published in articles I have written in The New York Times; conversely, any matters which I have not thus far disclosed in published articles would have been given to me based on the understanding that they were confidential and would not be published."

Accordingly, I would affirm the judgment of the Court of Appeals in No. 70–57, *United States* v. *Caldwell*.[44] In the other two cases before us, No. 70–85, *Branzburg* v. *Hayes* and *Branzburg* v. *Meigs*, and No. 70–94, *In the Matter of Paul Pappas*, I would vacate the judgments and remand the cases for further proceedings not inconsistent with the views I have expressed in this opinion.

[44] The District Court reserved jurisdiction to modify its order on a showing of a governmental interest which cannot be served by means other than Caldwell's grand jury testimony. The Government would thus have further opportunity in that court to meet the burden which, I think, protection of First Amendment rights requires.

SUPREME COURT OF THE UNITED STATES

No. 70–57

United States, Petitioner, v. Earl Caldwell. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 29, 1972]

MR. JUSTICE DOUGLAS, dissenting.

Caldwell, a Black, is a reporter for the New York Times and was assigned to San Francisco with the hope that he could report on the activities and attitudes of the Black Panther Party. Caldwell in time gained the complete confidence of its members and wrote in-depth articles about them.

He was subpoenaed to appear and testify before a federal grand jury and to bring with him notes and tapes covering interviews with its members. A hearing on a motion to quash was held. The District Court ruled that while Caldwell must appear before the grand jury, he need not reveal confidential communications unless the court was satisfied that there was a "compelling and overriding national interest." See 311 F. Supp. 358. Caldwell filed a notice of appeal and the Court of Appeals dismissed the appeal without opinion.

Shortly thereafter a new grand jury was impanelled and it issued a new subpoena for Caldwell to testify. On a motion to quash, the District Court issued an order substantially identical to its earlier one.

Caldwell refused to appear and was held in contempt. On appeal the Court of Appeals vacated the judgment of contempt. It said that the revealing of confidential sources of information jeopardized a First Amendment freedom, that Caldwell need not appear before the grand

jury absent a showing that there was a "compelling or overriding national interest" in pursuing such an interrogation.

The District Court had found that Caldwell's knowledge of the activities of the Black Panthers "derived in substantial part" from information obtained "within the scope of a relationship of trust and confidence." It also found that confidential relationships of this sort are commonly developed and maintained by professional journalist, and are indispensable to their work of gathering, analyzing, and publishing the news.

The District Court further had found that compelled disclosure of information received by a journalist within the scope of such confidential relationships jeopardized those relationships and thereby impaired the journalist's ability to gather, analyze, and publish the news.

The District Court finally had found that, without a protective order delimiting the scope of interrogation of Earl Caldwell by the grand jury, his appearance and examination before the jury would severely impair and damage his confidential relationships with members of the Black Panther Party and other militants, and thereby severely impair and damage his ability to gather, analyze, and publish news concerning them; and that it would also damage and impair the abilities of all reporters to gather, analyze, and publish news concerning them.

The Court of Appeals agreed with the findings of the District Court but held that Caldwell need not appear at all before the grand jury absent a "compelling need" shown by the Government. 434 F. 2d 1081.

It is my view that there is no "compelling need" that can be shown which qualifies the reporter's immunity from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime. His immunity in my view is therefore quite complete, for absent his

involvement in a crime, the First Amendment protects him against an appearance before a grand jury and if he is involved in a crime, the Fifth Amendment stands as a barrier. Since in my view there is no area of inquiry not protected by a privilege, the reporter need not appear for the futile purpose of invoking one to each question. And, since in my view a newsman has an absolute right not to appear before a grand jury it follows for me that a journalist who voluntarily appears before that body may invoke his First Amendment privilege to specific questions. The basic issue is the extent to which the First Amendment (which is applicable to investigating committees, *Watkins* v. *United States*, 354 U. S. 178; *NAACP* v. *Alabama*, 357 U. S. 449, 463; *Gibson* v. *Florida Legislative Investigating Committee*, 372 U. S. 539; *Baird* v. *State Bar*, 401 U. S. 1, 6–7; *In re Stolar*, 401 U. S. 23) must yield to the Government's asserted need to know a reporter's unprinted information.

The starting point for decision pretty well marks the range within which the end result lies. The New York Times, whose reporting functions are at issue here, takes the amazing position that First Amendment rights are to be balanced against other needs or conveniences of government.[1] My belief is that all of the "balancing" was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated, the timid, watered-down, emasculated ver-

[1] "The three minimal tests we contend must be met before testimony divulging confidences may be compelled from a reporter are these: 1. The government must clearly show that there is probable cause to believe that the reporter possesses information which is specifically relevant to a specific probable violation of law. 2. The government must clearly show that the information it seeks cannot be obtained by alternative means, which is to say, from sources other than the reporter. 3. The government must clearly demonstrate a compelling and overriding interest in the information." Amicus Brief, N. Y. Times, at 29.

sions of the First Amendment which both the Government and the New York Times advances in the case.

My view is close to that of the late Alexander Meiklejohn: [2]

> "For the understanding of these principles it is essential to keep clear the crucial difference between 'the rights' of the governed and 'the powers' of the governors. And at this point, the title 'Bill of Rights' is lamentably inaccurate as a designation of the first ten amendments. They are not a 'Bill of Rights' but a 'Bill of Powers and Rights.' The Second through the Ninth Amendments limit the powers of the subordinate agencies in order that due regard shall be paid to the private rights of the governed. The First and Tenth Amendments protect the governing 'powers' of the people from abridgment by the agencies which are established as their servants. In the field of our 'rights,' each one of us can claim 'due process of law.' In the field of our governing 'powers,' the notion of 'due process' is irrelevant."

He also believed that "Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express," [3] and that "[p]ublic discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power." [4]

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[2] Meiklejohn, The First Amendment Is Absolute, 1961 Sup. Ct. Rev. 245, 254.

[3] *Id.*, at 256.

[4] *Id.*, at 257.

Two principles which follow from this understanding of the First Amendment are at stake here. One is that the people, the ultimate governors, must have absolute freedom of and therefore privacy of their individual opinions and beliefs regardless of how suspect or strange they may appear to others. Ancillary to that principle is the conclusion that an individual must also have absolute privacy over whatever information he may generate in the course of testing his opinions and beliefs. In this regard, Caldwell's status as a reporter is less relevant than is his status as a student who affirmatively pursued empirical research to enlarge his own intellectual viewpoint. The second principle is that effective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination. In this respect, Caldwell's status as a newsgatherer and an integral part of that process becomes critical.

I

Government has many interests that compete with the First Amendment. Congressional investigations to determine how existing laws actually operate or whether new laws are needed. While congressional committees have broad powers, they are subject to the restraints of the First Amendment. As we said in *Watkins* v. *United States*, 354 U. S. 178, 197: "Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking."

Hence matters of belief, ideology, religious practices, social philosophy and the like are beyond the pale and of no rightful concern of government, unless the belief or the speech or other expression has been translated into action. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642; *Baird* v. *State Bar*, 401 U. S. 1, 6–7; *In re Stolar*, 401 U. S. 23.

Also at stake here is Caldwell's privacy of association. We have held that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP* v. *Alabama*, 357 U. S. 449, 462; *NAACP* v. *Button*, 371 U. S. 415.

As I said in *Gibson* v. *Florida Legislative Committee*, 372 U. S. 539, 565: ". . . the associational rights protected by the First Amendment . . . cover the entire spectrum in political ideology as well as in art, in journalism, in teaching, and in religion. [G]overnment is . . . precluded from probing the intimacies of spiritual and intellectual relationships in the myriad of such societie and groups that exist in this country, *regardless of the legislative purpose to be served* . . . . If that is not true, I see no barrier to investigation of newspapers, churches, political parties, clubs, societies, unions, and any other associations for their political, economic, social, philosophical, or religious views." (Emphasis added.)

The Court has not always been consistent in its protection of these First Amendment rights and has sometimes allowed a government interest to override the absolutes of the First Amendment. For example, under the banner of the "clear and present danger" test,[5] and later

[5] *E. g.*, *Schenck* v. *United States*, 249 U. S. 47 (wartime anti-draft leafleting); *Debs* v. *United States*, 249 U. S. 211 (wartime anti-draft speech); *Abrams* v. *United States*, 250 U. S. 616 (wartime leafleting calling for general strike); *Feiner* v. *New York*, 340

under the influence of the "balancing" formula,[6] the Court has permitted men to be penalized not for any harmful conduct but solely for holding unpopular beliefs.

In recent years we have said over and again that where First Amendment rights are concerned any regulation "narrowly drawn,"[7] must be "compelling" and not

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U. S. 315 (arrest of radical speaker without attempt to protect him from hostile audience); *Dennis* v. *United States*, 341 U. S. 494 (reformulation of test as "not improbable" rule to sustain conviction of knowing advocacy of overthrow); *Scales* v. *United States*, 367 U. S. 203 (knowing membership in group which espouses forbidden advocacy is punishable). For a more detailed account of the infamy of the "clear and present danger" test see my concurring opinion in *Brandenburg* v. *Ohio*, 395 U. S. 444, 447.

[6] *E. g.*, *Adler* v. *Board of Education*, 342 U. S. 485 (protection of schools from "pollution" outweighs public teachers' freedom to advocate violent overthrow); *Uphaus* v. *Wyman*, 360 U. S. 72, 79, 81 (preserving security of New Hampshire from subversives outweighs privacy of list of participants in suspect summer camp); *Barenblatt* v. *United States*, 360 U. S. 109 (legislative inquiry more important than protecting HUAC witness' refusal to answer whether a third person had been a communist); *Wilkinson* v. *United States*, 365 U. S. 399 (legislative inquiry more important than protecting HUAC witness' refusal to state whether he was currently a member of the Communist Party); *Braden* v. *United States*, 365 U. S. 431, 435 (legislative inquiry more important than protecting HUAC witness' refusal to state whether he had once been a member of the Communist Party); *Konigsberg* v. *State Bar*, 366 U. S. 36 (regulating membership of bar outweighs interest of applicants in refusing to answer question concerning communist affiliations); *In re Anastaplo*, 366 U. S. 82 (regulating membership of bar outweighs protection of applicant's belief in Declaration of Independence that citizens should revolt against an oppressive government); *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1 (national security outweighs privacy of association of leaders of suspect groups); *Law Students Research Council* v. *Wadmond*, 401 U. S. 154 (regulating membership of bar outweighs privacy of applicants' views on the soundness of the Constitution).

[7] Thus, we have held "overbroad" measures which unduly restricted the time, place, and manner of expression. *Schneider* v. *State*, 308 U. S. 147, 161 (anti-leafleting law); *Thornhill* v. *Ala-*

merely "rational" as is the case where other activities are concerned.[8] But the "compelling" interest in regulation neither includes paring down or diluting the right, nor

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bama, 310 U. S. 88, 102 (anti-boycott statute); *Cantwell* v. *Connecticut*, 310 U. S. 296 (breach of peace measure); *Cox* v. *Louisiana*, 379 U. S. 536 (breach of peace measure); *Edwards* v. *South Carolina*, 372 U. S. 229 (breach of peace statute); *Cohen* v. *California*, 403 U. S. 15, 22 (breach of peace statute); *Gooding* v. *Wilson*, 405 U. S. — (breach of peace statute). But insofar as penalizing the *content* of thought and opinion is concerned, the Court has not in recent Terms permitted any interest to override the absolute privacy of one's philosophy. To be sure, opinions have often adverted to the absence of a compelling justification for attempted intrusions into philosophical or associational privacy. *E. g.*, *Bates* v. *Little Rock*, 361 U. S. 516, 523 (disclosure of NAACP membership lists to city officials); *Gibson* v. *Florida Legislative Investigating Committee*, 372 U. S. 539, 546 (disclosure of NAACP membership list to state legislature); *DeGregory* v. *Attorney General of New Hampshire*, 383 U. S. 825, 829 (witness' refusal to state whether he had been a member of the Communist Party three years earlier); *Baird* v. *State Bar of Arizona*, 401 U. S. 1, 6-7 (refusal of bar applicant to state whether she had been a member of the Communist Party); *In re Stolar*, 401 U. S. 23 (refusal of bar applicant to state whether he was "loyal" to the government); see also *Street* v. *New York*, 394 U. S. 576 (expression of digust for flag). Yet, while the rhetoric of these opinions did not expressly embrace an absolute privilege for the privacy of opinions and philosophy, the trend of those results was not inconsistent with and in their totality appeared to be approaching such a doctrine. Moreover, in another group of opinions invalidating for overbreadth intrusions into the realm of belief and association, there was no specification of whether a danger test, a balancing process, an absolute doctrine, or a compelling justification inquiry had been used to detect invalid applications comprehended by the challenged measures. *E. g.*, *Wieman* v. *Updegraff*, 344 U. S. 183 (loyalty test which condemned mere unknowing membership in a suspect group); *Shelton* v. *Tucker*, 364 U. S. 479 (requirement that public teachers disclose all affiliations); *Gremillion* v. *NAACP*, 366 U. S. 293, 296 (disclosure of NAACP membership lists); *Whitehall* v. *Elkins*, 389 U. S. 54, 59 (nonactive membership in a

[*Footnote 8 on p. 9*]

embraces penalizing one solely for his intellectual viewpoint; it concerns the State's interest, for example, in regulating the time and place or perhaps manner of exercising First Amendment rights. Thus one has an undoubted right to read and proclaim the First Amendment in the classroom or in a park. But he would not have the right to blare it forth from a sound truck rolling through the village or city at 2 a. m. The distinction drawn in *Cantwell* v. *Connecticut*, 310 U. S. 296, 303–304, should still stand: "[T]he Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." [9]

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suspect group a predicate for refusing employment as a public teacher); *United States* v. *Robel*, 389 U. S. 258 (mere membership in Communist Party a sole ground for exclusion from employment in defense facility). Regrettably, the vitality of the overdue trend toward a complete privilege in this area has been drawn into question by quite recent decisions of the Court, *Law Students Research Council* v. *Wadmond*, 401 U. S. 154, holding that bar applicants may be turned away for refusing to disclose their opinions on the soundness of the Constitution; *Cole* v. *Richardson*, 405 U. S. —, sustaining an oath required of public employees that they will "oppose" a violent overthrow; and, of course, by today's decision.

[8] Where no more than economic interests were affected this Court has upheld legislation only upon a showing that it was "rationally connected" to some permissible state objective. *E. g.*, *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152; *Goesaert* v. *Cleary*, 335 U. S. 464; *Williamson* v. *Lee Optical Co.*, 348 U. S. 483; *McGowan* v. *Maryland*, 366 U. S. 420; *McDonald* v. *Board of Election Comm'rs*, 394 U. S. 802; *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U. S. 4; *Richardson* v. *Belcher*, 404 U. S. 78; *Schilb* v. *Keubel*, 404 U. S. 357.

[9] The majority cites several cases which held that certain burdens on the press were permissible despite incidental burdens on its newsgathering ability. For example, see *Sheppard* v. *Maxwell*, 384 U. S. 333, 358. Even assuming that those cases were rightly decided, the fact remains that in none of them was the Government attempting to extract personal belief from a witness and the privacy of a citizen's personal intellectual viewpoint was not implicated.

Under these precedents there is no doubt that Caldwell could not be brought before the grand jury for the sole purpose of exposing his political beliefs. Yet today the Court effectively permits that result under the guise of allowing an attempt to elicit from him "factual information." To be sure, the inquiry will be couched only in terms of extracting Caldwell's recollection of what was said to him during the interviews, but the fact remains that his questions to the Panthers and therefore the respective answers were guided by Caldwell's own preconceptions and views about the Black Panthers. His entire experience was shaped by his intellectual viewpoint. Unlike the random bystander, those who affirmatively set out to test an hypothesis, as here, have no tidy means of segregating subjective opinion from objective facts.

Sooner or later any test which provides less than blanket protection to beliefs and associations will be twisted and relaxed so as to provide virtually no protection at all. As Justice Holmes noted in *Abrams* v. *United States,* 250 U. S. 616, such was the fate of the "clear and present danger" test which he had coined in *Schenck* v. *United States,* 249 U. S. 47. Eventually, that formula was so watered down that the danger had to be neither clear nor present but merely "not improbable." *Dennis* v. *United States,* 341 U. S. 494, 510. See my concurring opinion in *Brandenburg* v. *Ohio,* 395 U. S. 444, 447. A compelling interest test may prove as pliable as did the clear and present danger test. Perceptions of the worth of state objectives will change with the composition of the Court and with the intensity of the politics of the times. For example, in *Uphaus* v. *Wyman,* 360 U. S. 72, sustaining an attempt to compel a witness to divulge the names of participants in a summer political camp, JUSTICE BRENNAN dissented on the ground that "it is patent that there is really no

subordinating interest. . . . demonstrated on the part of the State." *Id.*, 106. The majority, however, found that "the governmental interest in self-preservation is sufficiently compelling to subordinate the interest in associational privacy . . . ." *Id.*, 81. That is to enter the world of "make believe," for New Hampshire, the State involved in *Uphaus*, was never in fear of being overthrown.

II

Today's decision will impede the wide open and robust dissemination of ideas and counterthought which a free press both fosters and protects and which is essential to the success of intelligent self-government. Forcing a reporter before a grand jury will have two retarding effects upon the ear and the pen of the press. Fear of exposure will cause dissidents to communicate less openly to trusted reporters. And, fear of accountability will cause editors and critics to write with more restrained pens.

I see no way of making mandatory the disclosure of a reporter's confidential source of the information on which he bases his news story.

The press has a preferred position in our constitutional scheme not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people, to paraphrase Alexander Meiklejohn. Knowledge is essential to informed decisions.

As Mr. Justice Black said in *New York Times Co.* v. *United States*, 403 U. S. 713, 717 (concurring opinion), "The press was to serve the governed, not the governors. . . . The press was protected so that it could bare the secrets of government and inform the people."

Government has an interest in law and order; and history shows that the trend of rulers—the bureaucracy and

the police—is to suppress the radical and his ideas and to arrest him rather than the hostile audience. See *Feiner* v. *New York*, 340 U. S. 315. Yet as held in *Terminiello* v. *Chicago*, 337 U. S. 1, 4, one "function of free speech under our system of government is to invite dispute." We went on to say, "It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."

The people who govern are often far removed from the cabals that threaten the regime; the people are often remote from the sources of truth even though they live in the city where the forces that would undermine society operate. The function of the press is to explore and investigate events, inform the people what is going on, and to expose the harmful as well as the good influences at work. There is no higher function performed under our constitutional regime. Its performance means that the press is often engaged in projects that bring anxiety or even fear to the bureaucracies or departments or officials of government. The whole weight of government is therefore often brought to bear against a paper or a reporter.

A reporter is no better than his source of information. Unless he has a privilege to withhold the identity of his source, he will be the victim of governmental intrigue or aggression. If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended. If what the Court sanctions today becomes settled law, then the reporter's main function in American society will be to pass on to the public the press releases which the various departments of government issue.

It is no answer to reply that the risk that a newsman will divulge one's secrets to the grand jury is no greater than the threat that he will in any event inform to the police. Even the most trustworthy reporter may not be able to withstand relentless badgering before a grand jury.[10]

The record in this case is replete with weighty affidavits from responsible newsmen, telling how important are the sanctity of their sources of information.[11] When we deny newsmen that protection, we deprive the people of the information needed to run the affairs of the Nation in an intelligent way.

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[10] "The secrecy of the [grand jury's] proceedings and the possibility of a jail sentence for contempt so intimidate the witness that he may be led into answering questions which pry into his personal life and associations and which, in the bargain, are frequently immaterial and vague. Alone and faced by either hostile or apathetic grand juries, the witness is frequently undone by his experience. Life in a relatively open society makes him especially vulnerable to a secret appearance before a body that is considering criminal charges. And the very body toward which he could once look for protection has become a weapon of the prosecution. When he seeks protective guidance from his lawyer, he learns that the judicial broadening of the due process which has occurred in the past two decades has largely ignored grand jury matters, precisely because it was assumed that the grand jury still functioned as a guardian of the rights of potential defendants." Donnor & Cerruti, The Grand Jury Network: How the Nixon Administration Has Secretly Perverted A Traditional Safeguard of Individual Rights, 214 The Nation 5, 6 (1972).

[11] It is said that "we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury." But the majority need look no further than its holdings that prosecutors need not disclose informers' names because disclosure would (a) terminate the usefulness of an exposed informant inasmuch as others would no longer confide in him, and (b) it would generally inhibit persons from becoming confidential informers. *McCray* v. *Illinois*, 386 U. S. 300; *Scher* v. *United States*, 305 U. S. 251; cf. *Roviaro* v. *United States*, 353 U. S. 53.

Madison said:

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives (to W. T. Barry, August 4, 1822)." The Complete Madison 337 (1953).

Today's decision is more than a clog upon news gathering. It is a signal to publishers and editors that they should exercise caution in how they use whatever information they can obtain. Without immunity they may be summoned to account for their criticism. Entrenched officers have been quick to crash their powers down upon unfriendly commentators.[12] *E. g., New York Times Co.*

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[12] For a summary of early reprisals against the press, such as the John Peter Zenger trial, the Alien and Sedition Acts prosecutions, and Civil War suppression of newspapers, see Press Freedoms Under Pressure, Report of the Twentieth Century Fund Task Force on the Government and the Press 3–5 (1972). We have not outlived the tendency of officials to retaliate against critics. For recent examples see J. Wiggins, Freedom or Secrecy 87 (1956) ("New Mexico, in 1954, furnished a striking example of government reprisal against . . . a teacher in the state reform school [who] wrote a letter to the New Mexican, confirming stories it had printed about mistreatment of inmates by guards. . . . [Two days later he] was notified of his termination."); Note, the Right of Government Employees to Furnish Information to Congress: Statutory and Constitutional Aspects, 57 Va. L. Rev. 885–886 (1971) (dismissal of an Air Force employee who testified before a Senate committee with respect to C–5A cargo plane cost overruns and firing of an FBI agent who wrote Senators complaining of the Bureau's personnel practices; N. Y. Times, Nov. 8, 1967, at 1, col. 2; *ibid.*, Nov. 9, 1967, at 2, col. 4 (Selective Service directive to local draft broads requiring conscription of those who protested war; N. Y. Times, Nov. 11, 1971, at 95, col. 4; *ibid.*, Nov. 12, 1971, at 13, col. 1; *ibid.*, Nov. 14, 1971, at 18, col. 1 (FBI investigation of a television commentator who

v. *Sullivan*, 376 U. S. 254; *Garrison* v. *Louisiana*, 379 U. S. 64; *Pickering* v. *Board of Education*, 391 U. S. 563; *Gravel* v. *United States*, *ante*.

The intrusion of government into this domain is symptomatic of the disease of this society. As the years pass the power of government becomes more and more pervasive. It is a power to suffocate both people and causes. Those in power, whatever their politics, want only to perpetuate it. Now that the fences of the law and the tradition that has protected the press are broken down, the people are the victims. The First Amendment, as I read it, was designed precisely to prevent that tragedy.

criticized administration policies); *ibid.*, Nov. 14, 1971, at 75, col. 3 (denial of White House press pass to underground journalist).